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No. 633

Supreme Court of the United States

OCTOBER TERM, 1963

MILLER & LUX INCORPORATED, *Petitioner*,

v.

R. H. ANDERSON, et al., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Rule Involved	3
Statement	4
Reasons for Granting the Writ	13
Conclusion	22
Appendix	1a

CITATIONS

Cases:

Ackerley v. *Commercial Credit Co.*, 111 F. Supp. 92 (D.N.J. 1953)	17
American Fid. & Cas. Co. v. *All American Bus Lines*, 190 F.2d 234 (10th Cir. 1951)	21
Austin v. *Massachusetts Bonding & Ins. Co.*, 56 Cal. 2d 596, 364 P.2d 681 (1961)	21
Bowles v. *Superior Court*, 44 Cal. 2d 574, 283 P.2d 704 (1955)	6, 7
Buckner v. *Foster*, 105 F. Supp. 279 (E.D. Mich. 1952)	17
California Auto Court Ass'n v. *Cohn*, 98 Cal. App. 2d 145, 219 P.2d 511 (2d Dist. 1950)	15
Carl Gutmann & Co. v. *Rohrer Knitting Mills*, 86 F. Supp. 506 (E.D. Pa. 1949)	16
Dawson v. *Schloss*, 93 Cal. 194, 29 Pac. 31 (1892)	14, 17
Ellis v. *Jewett Rhodes Motor Co.*, 29 Cal. App. 2d 395, 84 P.2d 791 (3d Dist. 1938)	15
Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938)	18
Farrell v. *County of Placer*, 23 Cal. 2d 624, 145 P.2d 570 (1944)	14
Friend v. *Middle Atl. Transp. Co.*, 153 F.2d 778 (2d Cir. 1946)	17
Georgia v. *Pennsylvania R.R.*, 324 U.S. 439 (1945)	16
Greenwood v. *Mooradian*, 137 Cal. App. 2d 532, 290 P.2d 955 (2d Dist. 1955)	14
Hackner v. *Guaranty Trust Co.*, 117 F.2d 95 (2d Cir. 1941)	21
Hertz v. *Record Pub. Co.*, 219 F.2d 397 (3d Cir.), *cert. denied*, 349 U.S. 912 (1955)	18

Page

Holtz v. *United Plumbing & Heating Co.*, 49 Cal. 2d 501, 319 P.2d 617 (1957) 15
Jenkins v. *Westinghouse Elec. Co.*, 18 F.R.D. 267 (W.D. Mo. 1955) 18
Kincheloe v. *Retail Credit Co.*, 4 Cal. 2d 21, 46 P.2d 971 (1935) 15
Klopstock v. *Superior Court*, 17 Cal. 2d 13, 108 P.2d 906 (1941) 20
Lewis v. *Johnson*, 12 Cal. 2d 558, 86 P.2d 99 (1939) 15
Mackado v. *Katcher Meat Co.*, 108 Cal. App. 2d 1, 237 P.2d 715 (3d Dist. 1951) 15
Mox Inc. v. *Woods*, 202 Cal. 675, 262 Pac. 302 (1927) 14
Picking v. *Pennsylvania R.R.*, 152 F.2d 753 (3d Cir. 1945) .. 16
Valdez v. *Percy*, 35 Cal. 2d 338, 217 P.2d 422 (1950) 14
Ward v. *Deavers*, 203 F.2d 72 (D.C. Cir. 1953) 16
Weaver v. *Marcus*, 165 F.2d 862 (4th Cir. 1948) 16, 17
Wells v. *Universal Pictures Co.*, 166 F.2d 690 (2d Cir. 1948) .. 16
Wennerholm v. *Stanford Univ. School of Medicine*, 20 Cal. 2d 713, 128 P.2d 522 (1942) 21

Federal Rules of Civil Procedure:

Federal Rule of Civil Procedure 14 17
Federal Rule of Civil Procedure 19 3

Miscellaneous:

Moore, Federal Practice (2d ed. 1963) 17

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Miller & Lux Incorporated (hereafter "Miller & Lux"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on June 18, 1963. That judgment affirmed a judgment of the United States District Court for the Northern District of California dismissing petitioner's complaint as to all defendants on grounds which preclude any future recovery by or against any person on account of the wrongs charged in the complaint—wrongs which stand admitted in the present posture of the case.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California (Carter, J.) denying respondents' motion to dismiss for failure to join indispensable parties (R. 368) is reported at 141 F. Supp. 41 (*sub nom. Miller & Lux, Inc.* v. *Nickel*) and appears in the Appendix hereto at page 1a. The opinion of the District Court for the Northern District of California (Wollenberg, J.) reversing Judge Carter's denial of respondents' motions to dismiss for failure to join indispensable parties, and dismissing the complaint on this ground and for failure to state a claim entitling petitioner to relief (R. 892), is unreported. It appears in the Appendix at page 10a. The opinion of the Court of Appeals (R. 1151) is reported at 318 F. 2d 831, and appears in the Appendix at page 15a, and the judgment of that Court (R. 1162) appears in the Appendix at page 26a. The order of the Court of Appeals denying petitioner's petition for rehearing (R. 1163) appears in the Appendix at page 27a.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Ninth Circuit were filed on June 18, 1963. (R. 1161, 1162.) Petitioner's timely application for rehearing was denied by that Court on August 19, 1963. (R. 1163.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether in a suit against a number of joint wrongdoers for recovery of properties and for damages, the absence as parties defendant of certain of the wrongdoers requires that the complaint be dismissed without trial under Rule 19 of the Federal Rules of Civil Pro-

cedure for failure to join indispensable parties, merely because the court believes that those of the joint wrongdoers named as defendants may not be *in pari delicto* with those not named, when under the applicable substantive law (a) the named wrongdoers are jointly and severally liable to the plaintiff regardless of their relative degree of culpability as compared with wrongdoers not named; (b) the wrongdoers not named have made settlement and have been given covenants not to sue which do not release the wrongdoers named; and (c) dismissal of the complaint would forever foreclose recovery in any form against persons whose wrongs in the present posture of the case stand admitted.[1]

RULE INVOLVED

Rule 19 of the Federal Rules of Civil Procedure provides in pertinent part:

> "(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.
>
> "(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be

[1] If the Court should grant the writ of certiorari and set the case for argument rather than making the summary disposition which we suggest below, we intend also to urge that in holding that in any event petitioner was disabled from asserting its rights against the persons who had wronged it by virtue of the fact that certain of those wrongdoers had on its behalf impliedly "consented" to their own misconduct, the Court of Appeals erred in ignoring controlling California law and in attempting to fashion, without factual or legal foundation, a general rule of what it deemed to be equity.

parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the actions without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons."

STATEMENT

This case was instituted by petitioner in 1954. (R. 14.) In the nine years that have since elapsed petitioner has never been given an opportunity to prove the allegations of its complaint. Rather, in 1962, nearly eight years after the filing of the original complaint,[2] and after the occurrence of certain collateral developments providing the strongest indication of the substantive merit of at least some of the charges made, the third District Judge to be assigned to the case directed dismissal of the complaint on grounds essentially unrelated to the merits. (R. 892.) Since the applicable statute of limitations has long since run against the institution of a new action, if the dismissal is allowed to stand it will forever foreclose

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[2] The original complaint has been twice amended with the permission of the court. Unless otherwise noted all references hereafter to the complaint are to the Second Amended Complaint, filed April 17, 1958. (R. 422.)

recovery, by anyone, on account of the grievous frauds and lengthy course of wrongdoing alleged in the complaint and will forever insulate all the defendants from any judicial inquiry into the serious charges made against them.

Petitioner Miller & Lux is a Nevada corporation. (R. 423.) It is in no sense a shell, but rather has at all pertinent times held substantial assets, largely in the form of land and securities. At all pertinent times petitioner's stock has been held in trust for the beneficiaries of the Henry Miller Trust, a California trust which was established in the early part of this century and which had three life tenants and some 28 individual contingent remaindermen when this suit was filed. (R. 425.)

Early in 1954 certain of the beneficiaries of the Henry Miller Trust became aware of facts strongly indicating that there had long existed an unlawful scheme on the part of various of the trustees of the Trust, all of whom were directors of petitioner, certain other directors, and certain officers, employees and agents of petitioner and a number of outsiders. That scheme had been one to loot petitioner by depriving it of many of its valuable assets for a wholly inadequate consideration, by sales to and through dummy purchasers and other forms of fraudulent self-dealing and manipulation. On the basis of this information, a suit was promptly instituted in the state courts of California, seeking the ouster of the then trustees of the Henry Miller Trust. (R. 456.) That suit was a preliminary step in ridding petitioner of the domination of the persons who, it appeared, had long acted in a way wholly inimical to the interests of petitioner and its beneficial stockholders.

Two of the three trustees promptly resigned and the third was removed by order of the California court. (R. 456; see *Bowles* v. *Superior Court*, 44 Cal. 2d 574, 283 P. 2d 704 (1955).) The new and independent trustees appointed by the Court promptly made changes in petitioner's Board of Directors. The new Board of Directors immediately instituted an investigation, and promptly caused this action to be instituted by petitioner in the United States District Court for the Northern District of California, involving the jurisdiction of that court under the provisions of 28 U.S.C. § 1332(a)(1). (R. 457-458.)

As originally filed and subsequently amended, the complaint alleged, in essence, a vast scheme, implemented over a period of more than two decades, whereby various of petitioner's former directors, officers and agents had acted wrongfully to enrich themselves and their confederates by disposing of various of petitioner's assets—principally land with actual or potential value for oil development—to themselves and their confederates at wholly inadequate prices. (R. 428-449.) Named as defendants were these directors, officers and agents (or in the case of those deceased, their estates), and the confederates above referred to. Also named were certain other persons who had taken conveyances of particular interests in lands wrongfully secured from petitioner with notice or knowledge that as to those conveyances they were participating in the implementation of a wrongful plan. All the defendants except the group last described were charged as joint tortfeasors with respect to all the transactions alleged in the complaint, and each of the group last described was charged as

a joint tortfeasor with the entire first group of defendants with respect to the particular transactions in which he participated. The complaint sought the return of the lands and properties wrongfully taken and, to the extent that interests in those lands and properties had been subsequently retransferred to innocent third parties, money damages from the wrongdoer transferors, all in a total sum of 110 million dollars. (R. 458-460.)

It soon became apparent that the allegations of the complaint were not without substance. Shortly after the complaint was filed, a settlement was entered into between petitioner and the estate of one of the defendants, a faithless former agent named Houchin, whereby petitioner received from that estate more than two million dollars in cash, and property with an additional value of several million dollars. See *Bowles* v. *Superior Court*, 44 Cal. 2d 574, 581, 283 P. 2d 704, 709 (1955). In consideration of this settlement, petitioner dismissed the Houchin Estate and its executors as defendants to the complaint (R. 360) and executed a covenant not to sue as to them. Because, as above recited, the total injury suffered by petitioner was many times the several million dollars thus received by it, and because Houchin was only one of the many persons charged with wrongdoing, petitioner continued to proceed, as was its right, with its action against the remaining defendants.

During the months which followed, three additional defendants, J. Leroy Nickel, Jr., J. E. Woolley and A. R. Olsen, made settlement with petitioner, were given covenants not to sue, and were dismissed from the action. (R. 50, 64, 234.) Because J. Leroy Nickel,

Jr., was at the time of the settlement himself one of the life-tenant beneficiaries of the Henry Miller Trust, although without any remainder interest therein, petitioner required him in the instrument of settlement specifically and completely to disclaim all rights to any principal amount recovered in this litigation or to any income attributable thereto. (R. vol. 4, pp. 86-91.) These settlements, like that with the Houchin Estate, resulted in some recovery to petitioner, but in an amount equal to only a small fraction of the total damages claimed in the complaint.

The remaining defendants attacked the complaint with a broad array of motions. (See R. 201-222, 238-359, 363-367.) Among these were motions for dismissal on the ground that the beneficiaries of the Henry Miller Trust were indispensable parties who could not be joined as such without destroying the jurisdiction of the Court. The essential theory of the motions was that because J. Leroy Nickel, Jr., was both a life beneficiary in the Trust that held petitioner's stock and one of those charged with wrongs against the corporation, any recovery by petitioner should be reduced by an amount equal to that by which Nickel might potentially benefit, directly or indirectly, as a result of that recovery, and that the only way that this could be accomplished was by joining the beneficiaries other than Nickel as the "true" plaintiffs. (See R. 282-283.)

On May 15, 1956, the District Court (Carter, J.) denied the motions, holding that it was apparent that petitioner had a bona fide corporate entity and was not the mere alter ego of its beneficial stockholders, and that under these circumstances the fact that Leroy Nickel might have an indirect interest in a corporate

recovery was an insufficient reason to ignore petitioner's existence and require the beneficiaries or the trustees of the Henry Miller Trust to be joined as parties. (R. 368.)[3]

During the succeeding years plaintiff proceeded with discovery and other investigative measures.[4] Although its efforts were partially frustrated by the suicide of J. Leroy Nickel, Jr., in 1959, on the eve of the taking of his deposition (R. 778-780, 789), that discovery and investigation nevertheless produced abundant additional evidence supporting the charges of petitioner's complaint.

In March 1962, some six years after Judge Carter's ruling and well after the running of the applicable statute of limitations against the institution of a new action, but before petitioner had been permitted to go to trial on the allegations of its complaint, another Judge of the District Court (Wollenberg, J.) reversed Judge Carter's ruling, holding that for the very reasons previously considered and rejected, the trustees and beneficiaries of the Henry Miller Trust were in fact indispensable parties, whose joinder would destroy the court's jurisdiction. (R. 892.) In the same opinion, Judge Wollenberg went on to hold that in any event the complaint failed to state a claim upon which

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[3] In fact, as noted above, J. Leroy Nickel, Jr., could not have had any interest, direct or indirect, in any recovery by petitioner since he had expressly waived any right to participate in any way in such recovery.

[4] During this period petitioner answered 42 sets of interrogatories propounded by respondents containing in excess of 2,800 individual questions; and respondents answered 39 sets of interrogatories containing more than 2,350 individual questions. Over 1,500 pages of depositions were taken of 27 different persons and approximately 50 days of proceedings were had in the District Court.

relief could be granted because it disclosed that among the persons identified therein as wrongdoers were three who for some years prior to the filing of the complaint had served as trustees of the Henry Miller Trust and in that capacity had collectively held legal title to petitioner's stock. The Court reasoned that as wrongdoers these defendants must have "consented" to their own wrongs, and that this fact brought into play a rule that a corporation cannot sue third parties on account of transactions to which all its shareholders have consented.

Petitioner appealed the dismissal of its complaint, urging that the District Court had erred both in finding that the trustees and beneficiaries of the Henry Miller Trust were indispensable parties and in holding that an implied "consent" to their own misconduct of persons holding the bare legal title to petitioner's stock foreclosed petitioner from thereafter proceeding against those persons and their confederates and transferees with notice. (R. 907, 1146.) In an opinion altogether barren of any citation of relevant authority, the Court of Appeals affirmed the District Court's judgment.

The Court of Appeals held, as the District Court had held, that petitioner, as a corporation whose stock was held by a trust, had no right to sue anyone on account of actions in which persons who were trustees or who later became trustees of that trust were claimed to have participated. (See R. 1159-1161.) Without any reference to California law, the court supported its holding by invoking what it appeared to believe to be general principles of equity. The court reasoned that it would be unfair to permit a corporation to sue

a third party who had dealt with it on a basis which, although plainly improvident from the corporation's standpoint, had been approved by persons whom the third party believed to hold the entire legal and equitable interest in that corporation. The court made no effort to relate this concern to the present case, where no defendant has made any attempt to show that in its dealings with petitioner's faithless officers, employees and agents it reasonably relied on a belief that petitioner's true owners had authorized or approved those dealings.

On the issue of indispensable parties the court's primary concern was not, like that of the District Court, the absence of the trustees and beneficiaries of the Henry Miller Trust. Rather, the court held that the litigation could or should not proceed in the absence of four persons, whom it characterized as "primary wrongdoers," who were described in the complaint as important actors in the scheme of fraud there delineated but who were not named as defendants. (R. 1156-1157.) Three of the four persons named by the court, J. Leroy Nickel, Jr., Woolley and Olsen, had, as above stated, been named as defendants in the original complaint but had thereafter made settlement with petitioner and been dismissed. The fourth, one Fickett, had died prior to the filing of the Second Amended Complaint and accordingly was not himself named as a defendant, although contrary to the court's apparent understanding, his estate and its executors were so named. (See R. 422, 450-451.)

The court recognized that the defendants named in the complaint were charged as joint wrongdoers with those who had been dismissed (see R. 1153), and did not suggest that the facts stated in the complaint failed

to show liability on the part of the named defendants. Nevertheless, the court held that the four persons named above were indispensable parties defendant because the court was unwilling to assume "that the defendants included in the second amended complaint are *in pari delicto* with the primary wrongdoers named but not made defendants in the complaint" (R. 1156), and because it believed that it might well be unfair to require the named defendants "to bear alone the entire responsibility for the wrong." (*Ibid.*) The court thus ruled that in a suit in a federal court against joint wrongdoers, all those characterized in the complaint as important participants in the joint wrong are indispensable parties, and hence that the execution by plaintiff of a covenant not to sue any such important participant is in and of itself fatal to the jurisdiction of the federal court over a suit against other of the joint wrongdoers.[5]

The court's opinion ended with a peroration as to the desirability of a suit in which the beneficiaries of the Henry Miller Trust would come forward to "speak for themselves," prophesying that "when they do speak," a litigation more generally satisfactory than the present one can take place. (R. 1160-1161.) The court appeared to be unaware of, or to ignore, the fact that if its decision stands neither the beneficiaries nor anyone else will be in a position to speak as to the wrongs detailed in the complaint, because of the

[5] The court also seemed to be of the view that because J. Leroy Nickel, Jr., was both a beneficiary of the Henry Miller Trust and an alleged wrongdoer, all the other beneficiaries of the Trust were indispensable parties plaintiff because absent their joinder no assurance could be had that Nickel would not share in any recovery by petitioner. (R. 1158, 1160.) It did not, however, appear to rest its decision in whole or in part on this latter ground. As we have shown above (p. 8), the court's suggestion rests on a misapprehension of fact.

running of the statute of limitations against the institution of a new suit during the nine-year period that elapsed between the filing of the original complaint and the entry of the judgment below.

REASONS FOR GRANTING THE WRIT

This is the rare case in which certiorari should be granted because a Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as plainly to call for the corrective exercise of this Court's power of supervision. It is, moreover, the rare case in which it is appropriate that this power be exercised summarily, without the necessity for additional briefs or for oral argument. The ruling of the court below that the complaint must be dismissed because four of the many persons described therein as wrongdoers have been voluntarily dismissed by petitioner as defendants is contrary to the decisions of other Courts of Appeals, rests upon demonstrably untenable foundations, and if permitted to stand will have grossly unjust consequences. Although not in terms so denominated, the ruling necessarily is that these persons were in the court's view indispensable parties defendant to this litigation within the meaning of Rule 19 of the Federal Rules of Civil Procedure. That ruling so far distorts as to render unrecognizable the concept of indispensable parties as embodied in Rule 19, and unless promptly corrected will be a fertile source of future confusion in the application of that rule.

It may be suggested that because the decision of the court below rests also upon another ground, *i.e.*, that the cause of action sought to be asserted here is in reality not petitioner's but that of the present trustees or beneficiaries of the Henry Miller Trust,

correction of that court's egregious misapplication of the indispensable parties rule would have only academic consequences. We believe that this ruling too is demonstrably erroneous, and that the court below either ignored or flagrantly misapplied California law in reaching it. We do not, however, tender it as an independent ground supporting the exercise of this Court's certiorari jurisdiction, or the relief which petitioner here seeks. Nevertheless, as we shall show, a reversal of the decision below insofar as it rests on the issue of indispensable parties, and a vacating of the Court of Appeals' judgment, will have direct legal consequences in this litigation that are far from academic even without a correction by this Court of the other erroneous ruling referred to. For that action will open, with respect to the conduct detailed in petitioner's complaint, avenues to at least partial relief which are inexorably closed so long as the Court of Appeals' present judgment is permitted to stand.

A.

Because this is a diversity case, the substantive rights of the parties are governed by state law—here by the law of California. Under that law, as under the law of all the other states, joint tortfeasors are liable to those injured by their tort both jointly and severally. *E.g., Valdez* v. *Percy*, 35 Cal. 2d 338, 217 P.2d 422 (1950); *Farrell* v. *County of Placer*, 23 Cal. 2d 624, 145 P.2d 570 (1944); *Dawson* v. *Schloss*, 93 Cal. 194, 29 Pac. 31 (1892). This is so irrespective of whether they are *in pari delicto* with one another, for that fact is relevant, if at all, only to a determination of their ultimate liability as among themselves. *Mox Inc.* v. *Woods*, 202 Cal. 675, 262 Pac. 302 (1927); *Greenwood* v. *Mooradian*, 137 Cal. App. 2d 532, 290 P.2d 955 (2d

Dist. 1955); *Machado* v. *Katcher Meat Co.*, 108 Cal. App. 2d 1, 237 P.2d 715 (3d Dist. 1951); *California Auto Court Ass'n* v. *Cohn*, 98 Cal. App. 2d 145, 219 P.2d 511 (2d Dist. 1950). The court below pointed to no exception to that rule under the law of California, and none in fact exists. Under California law it is equally clear that the execution by a plaintiff of a covenant not to sue one joint tortfeasor in no way affects or limits the plaintiff's right to proceed against other joint tortfeasors, although his potential recovery against the latter is of course diminished by the amount received in consideration of the covenant. *Lewis* v. *Johnson*, 12 Cal. 2d 558, 86 P.2d 99 (1939); *Kincheloe* v. *Retail Credit Co.*, 4 Cal. 2d 21, 46 P.2d 971 (1935); *Ellis* v. *Jewett Rhodes Motor Co.*, 29 Cal. App. 2d 395, 84 P.2d 791 (3d Dist. 1938). Indeed, this principle is so well settled that it is applied not only where the remaining defendant is not *in pari delicto*, but even where the covenantee is, as among the tortfeasors, ultimately soley liable. *Holtz* v. *United Plumbing & Heating Co.*, 49 Cal. 2d 501, 319 P.2d 617 (1957).

Given these applicable rules of substantive law, the decision of the Court of Appeals that the persons whom it characterized as "primary wrongdoers" are indispensable parties must rest on one or the other of two possible grounds. The court may have proceeded on the theory that, even though under California law the culpability of tortfeasors not charged as defendants does not diminish the liability to the plaintiff of those who are charged, nevertheless, if under that law it might be appropriate to exact a contribution by the "primary" wrongdoers to any recovery had from the "secondary" wrongdoers, then the federal standard of Rule 19 of the Federal Rules of Civil Procedure re-

quires that the "primary" wrongdoer be joined in a suit against the "secondary" one.[6] Alternatively (and the court's failure to make any reference to California law tends to suggest the likelihood of this explanation) the theory may have been that irrespective of obligations which state law imposes on the perpetrators of a joint wrong to the victim thereof, a federal court sitting in diversity may, if it deems the consequences of application of that law to be "inequitable," ignore that law and instead allocate liability on any basis which it deems to be "just."

To the extent that the decision of the Court of Appeals as to the indispensability of Nickel, Woolley, Olsen and Fickett rests on the proposition that the wrongdoers named in the complaint are not *in pari delicto* with them, although jointly liable with them so far as the persons injured by the joint tort is concerned, it is squarely contrary to the decisions of other Courts of Appeals that persons jointly and severally liable to the plaintiff under relevant state law may be proceeded against separately in a diversity action in the federal courts, so long as the relief sought will not adversely affect the interests of the absent party. See, *e.g.*, *Ward* v. *Deavers*, 203 F.2d 72 (D.C. Cir. 1953); *Wells* v. *Universal Pictures Co.*, 166 F.2d 690 (2d Cir. 1948); *Weaver* v. *Marcus*, 165 F.2d 862 (4th Cir. 1948); *Picking* v. *Pennsylvania R.R.*, 152 F.2d 753 (3d Cir. 1945); *cf. Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945); see also *Carl Gutmann & Co.* v. *Rohrer Knitting Mills*, 86 F. Supp. 506 (E.D. Pa.

[6] We here use the characterizations "primary" and "secondary" in light of the court's use of the former term. In fact, of course, so far as the rights of a plaintiff injured by a joint wrong is concerned the law knows no distinction between the "primary" and "secondary" actors in that wrong.

1949); *Ackerley* v. *Commercial Credit Co.*, 111 F. Supp. 92 (D.N.J. 1953).[7]

The decision is, moreover, plainly erroneous. Even if it were to be assumed that under California law a "secondary" wrongdoer has some right of contribution as against a "primary" one if a plaintiff has succeeded in collecting from him what under the circumstances appears to be a disproportionate share of the damages occasioned by the joint tort, that fact would in no way support a holding that the plaintiff must make the primary wrongdoer a defendant in any suit against the secondary one or suffer dismissal. In this situation the defendant might perhaps be able to make the primary wrongdoer a third-party defendant, if he chose to do so. Indeed, it is for precisely situations such as this that the liberal third-party practice of Rule 14 of the Federal Rules of Civil Procedure is designed. But under that Rule it is clear that a plaintiff can *not* be required to join such a person as a defendant if he does not choose to do so. See *Weaver* v. *Marcus*, 165 F.2d 862, 866 (4th Cir. 1948); *Friend* v. *Middle Atl. Transp. Co.*, 153 F.2d 778 (2d Cir. 1946); *Buckner* v. *Foster*, 105 F. Supp. 279 (E.D. Mich. 1952); 3 Moore, *Federal Practice* ¶¶14.01 [1]–[3], 14.15 (2d ed. 1963). The decision below is in square and irreconcilable conflict with the cited cases and with the policy of, and practice under, Rule 14.[8]

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[7] The law of California has long been to the same effect. Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31 (1892).

[8] Petitioner does not claim that every named defendant is responsible for the entire tortious course of conduct set forth in its complaint. As pointed out above in the Statement of the Case, a number of defendants are charged with liability only as to the transactions in which they personally participated. As to these transactions, however, they are joint tortfeasors and liable to a degree equal to the other tortfeasors, named and unnamed.

If in fact the holding below is based on its only other possible rationale, it is no less plainly erroneous and creates a conflict of decision no less irreconcilable. For to reach its remarkable result by this course the court must needs have determined that *irrespective* of the substantive liabilities imposed by California law on persons in the position of the present defendants, it was free to make an independent judgment, under some unarticulated standard of its own invention, as to the "fairness" of the imposition of such liabilities, and to apply the indispensable party test of Rule 19 of the Federal Rules of Civil Procedure only after reallocating to its own satisfaction these liabilities as between those defendants and other persons. Such a holding cannot of course stand under the fundamental rule of decision which controls the federal courts in diversity cases—that on matters of substance the federal courts are not free to apply their own concepts of justice but are compelled to follow the law as it is applied by the courts of the state in which they sit. *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). Such a holding in addition specifically conflicts with the decisions in other circuits holding that in passing on the federal question of indispensability under Rule 19 in a diversity case, the court will take the substantive interests of the parties as it finds them under state law. See, *e.g.*, *Hertz* v. *Record Pub. Co.*, 219 F.2d 397 (3d Cir.), *cert. denied*, 349 U.S. 912 (1955); *Jenkins* v. *Westinghouse Elec. Co.*, 18 F.R.D. 267 (W.D. Mo. 1955). It should be overturned forthwith.

It may finally be noted that, even if under the law of California a "secondary" wrongdoer is liable to a plaintiff for less than all of the injury caused him by the wrong, there would still be no basis for holding on

that account that the "primary" wrongdoer is an indispensable party in an action brought against the secondary wrongdoer. Under these circumstances the rights of the secondary wrongdoer would be fully served by permitting him to introduce evidence of, and plead in mitigation, the primary wrongdoing of others, steps which he would be equally free to take irrespective of whether the primary wrongdoers were also named as defendants. If this were the law the plaintiff would, of course, suffer by reason of his failure to join the primary wrongdoer, for his recovery against the secondary wrongdoer would leave him less than whole, but that is plainly something of which the wrongdoers would be in no position to complain.[9]

B.

As indicated above, petitioner recognizes that the decision below purported to rest not only on the ground of absence of indispensable parties, but also on the ground that petitioner had no right to enforce the causes of action set forth in the complaint because those causes of action in fact belonged to the trustees or beneficiaries of the Henry Miller Trust. Petitioner recognizes also that when a judgment rests on truly alternative and independent grounds there is no basis for vacating it merely because one of those grounds has been shown to be wholly insupportable, since the same

[9] It is unnecessary to discuss the court's suggestion that the persons to whom petitioner had given covenants not to sue were indispensable defendants because their presence was essential in order to ascertain the degree to which settlements made by them had already compensated petitioner. This is of course a matter to be dealt with by way of evidence, and does not require the presence of the persons referred to as defendants. Indeed, the court does not trouble to explain how persons given covenants not to sue *could* be named as defendants.

result would nevertheless be dictated by the other ground of decision taken alone. In the instant case, however, a determination by this Court that the court below erred on the issue of indispensable parties would fully justify, and indeed would require, a vacating of the judgment below, for the following reasons:

As pointed out above, neither the trustees nor the beneficiaries of the Henry Miller Trust could now institute a new suit, against anyone, on account of the transactions complained of in the instant case, since the applicable statute of limitations ran as to any such new suit during the nine years that elapsed between the filing of petitioner's complaint and the judgment of the court below. Even if it were to be assumed, however, that the ruling below that petitioner was not the proper party to bring this suit was correct, a decision based on that ground alone would not preclude, as the judgment of the Court of Appeals at present precludes, the further maintenance of this litigation. Rather, it has been held by both the California and federal courts in circumstances strikingly similar to those here presented that if it is determined, after the running of the limitations period against a new action, that the party who has brought suit in the first instance is not the proper plaintiff, the correct course is to permit amendment of the complaint to substitute one or more proper plaintiffs for the plaintiff found to be improper and, so long as recovery is sought "upon the same general set of facts," to relate the complaint of the substituted plaintiffs back to the date of original filing so as to avoid the bar of limitations.[19]

[19] See, for example, Klopstock v. Superior Court, 17 Cal. 2d 13, 108 P.2d 906 (1941). There a derivative suit had been instituted by a representative of the legatee of a deceased stockholder, and the California Supreme Court held that because the representative

Accordingly, had the decision below been solely that it was the trustees or beneficiaries of the Henry Miller Trust who were the real parties in interest with respect to the facts alleged in petitioner's complaint—and hence should be the parties plaintiff—the effect of that decision would not have been forever to foreclose the rights of those trustees and beneficiaries, but rather simply to require the substitution of the trustees or beneficiaries as plaintiffs in petitioner's stead.[11] So long as the court's ruling on the issue of

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was not a proper plaintiff, a demurrer to the complaint should have been sustained on grounds of no cause of action. The Court nevertheless went on to hold that it was altogether proper to permit an amendment of the complaint which in effect substituted a proper plaintiff for the one found improper. See also Wennerholm v. Stanford Univ. School of Medicine, 20 Cal. 2d 713, 128 P.2d 522 (1942); Austin v. Massachusetts Bonding & Ins. Co., 56 Cal. 2d 596, 364 P.2d 681 (1961); Hackner v. Guaranty Trust Co., 117 F.2d 95 (2d Cir. 1941); American Fid. & Cas. Co. v. All American Bus Lines, 190 F.2d 234 (10th Cir. 1951).

[11] Because of the large number of beneficiaries involved, in all likelihood the complaint would under these circumstances be amended to name the present trustees of the Henry Miller Trust rather than the beneficiaries as plaintiffs. The suggestion of the Court of Appeals that it might be necessary to have the beneficiaries as parties plaintiff rests on a basic misapprehension of fact. The sole reason advanced for the suggestion was that because the former life interest beneficiary J. Leroy Nickel, Jr., is claimed in the complaint to have been a wrongdoer, it might be necessary for the court so to mold an eventual decree as to prevent his estate from having any interest in any recovery allowed. As explained above, however, J. Leroy Nickel, Jr., long ago formally disclaimed any interest in such recovery. Accordingly, although defendants will be free to urge on trial that any recovery awarded the trustees should be diminished in an amount equal to the interest that Nickel's estate would have had in that recovery absent the disclaimer, the Court will be able to accept or reject that argument as it sees fit without the presence of Nickel's estate without in any way prejudicing the interests of that estate.

indispensable parties stands, however, such a course is foreclosed, because if the California citizens found by that court to be indispensable as defendants are in fact indispensable neither the trustees nor the beneficiaries of the Henry Miller Trust, also California citizens, could be substituted as plaintiffs without destroying diversity and thus depriving the court of jurisdiction. Accordingly, only if that ruling is reversed, and the judgment of dismissal vacated, will it be possible for the first time for the trustees or beneficiaries to invoke the right of substitution and thus preserve their rights against the bar of limitations.

CONCLUSION

For the foregoing reasons petitioner prays that this petition for certiorari be granted, and that the judgment below be summarily vacated and the case remanded to the Court of Appeals with directions to remand the case to the District Court for consideration of a motion for amendment of the complaint by way of substitution of parties plaintiff. Alternatively, petitioner prays that the writ of certiorari be granted.

Respectfully submitted,

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November 18, 1963

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil Action No. 34043

MILLER & LUX INCORPORATED, a Nevada corporation, *Plaintiff*,

v.

J. LEROY NICKEL, JR., *et al.*, *Defendants*.

OLIVER J. CARTER, District Judge.

Plaintiff corporation brings suit against several of its former officers and directors, alleging that while these defendants were in control of the plaintiff, that they conspired to defraud the plaintiff and did defraud the plaintiff by causing various parcels of real property to be conveyed from the plaintiff to themselves, or to be conveyed from the plaintiff to others who held title for the benefit of these defendants. Plaintiff joins numerous defendants who, it is alleged, took title to real property with notice of the plaintiff's rights in that property, and plaintiff also sues numerous defendants by fictitious names. Jurisdiction of this Court is postulated on a diversity of citizenship between the plaintiff, a Nevada corporation, and the defendants, who are alleged to be citizens of states other than Nevada.

The defendants filed a variety of motions attacking the complaint, and plaintiff elected to file a First Amended Complaint. Many of the defendants' motions were renewed against the First Amended Complaint. In order to permit an orderly determination of the issues thus raised this Court ordered a stay of all proceedings until the hearing and determination of the motions attacking the jurisdiction of the Court; the latter motions are the subject of this Memorandum and Order.

Some of the defendants contend that plaintiff has failed to join certain persons who are indispensable parties; that the interests of these absent parties are "aligned" with

the interests of the plaintiff; and that the joinder of those persons as plaintiffs would destroy diversity of citizenship between the plaintiffs and the defendants because some of those persons are citizens of California, as are some of the defendants. This contention is based upon the following facts and reasoning:

The stock of plaintiff corporation is wholly owned by the trustees of the Henry Miller Trust. One of the defendants, J. Leroy Nickel, Jr., who is alleged to have actively defrauded the plaintiff corporation, is also a beneficiary of the Henry Miller Trust. Other defendants who are alleged to have taken title to real property with notice of the plaintiff's right in that property, claim that they are not in pari delicto with J. Leroy Nickel, Jr., and that any recovery by the corporation against those defendants ought to be reduced by the amount that would ultimately go to J. Leroy Nickel, Jr. The other beneficiaries of the Henry Miller Trust are indispensable parties, according to this argument, because there are conflicts of interest between J. Leroy Nickel, Jr. and the other beneficiaries which necessitate the adjudication of their respective interests in the Henry Miller Trust, and the interests of these beneficiaries cannot be determined in their absence.

Put another way, the contention is that in order to reach an equitable result this Court must disregard the corporate entity of the plaintiff and consider that the beneficiaries of the Henry Miller Trust are the true plaintiffs; in that way the Court can settle alleged conflicts of interest between the beneficiaries, and prevent J. Leroy Nickel, Jr. from being an ultimate beneficiary of the corporate recovery.

Defendants have not cited any case in which a court disregarded a corporate entity and then disregarded a trust relationship in addition; defendants have cited Wenban Estate, Inc. v. Hewlett, 193 Cal. 675, in which the Supreme Court of California looked through a corporate entity in accordance with the following principles which are stated by the court at page 697:

"Thus proof that an individual owns all of the stock of a corporation and that the corporation is in truth and in fact but the corporate double of the owner of the stock, will, in conjunction with a further showing that as a result of the double relationship fraud or injustice will inure to a third person, suffice to dissipate the separate identity of the corporation. * * *

"In Erkenbrecher v. Grant, 187 Cal. 7 [200 P. 641], it was held that in order to cast aside the legal fiction of distinct corporate existence it must appear that 'they are the "business conduit and alter ego of one another", and that to recognize their separate entities would aid the consummation of a wrong.'

"Minifie v. Rowley * * * [187 Cal. 481] * * * states the rule to be: 'Before the acts and obligation of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person has ceased * * *.'"

These principles are taken by this Court to be a fair statement of the California law applicable here. Upon examination of the facts relied upon by the moving defendants in the case at bar, it is at once apparent that the plaintiff corporation is not the mere alter ego of a stockholder or group of stockholders. Miller & Lux, Incorporated has been a bona fide corporation for many years; it has engaged in a variety of business transactions, and it cannot be said that persons dealing with the corporation were actually dealing with its stockholders. If any closely-held corporation can be said to have an existence separate from its stockholders, this one has.

Defendants cite Western Battery & Supply Co. v. Hazelett Storage Battery Co., 8 Cir., 61 F.2d 220, for the proposition that if the beneficiaries of a trust are equitably

precluded from relief, the trustees are likewise precluded; but the trust involved in that case was little more than a sham, as indicated by the following portions of the opinion of the court, (61 F.2d at page 231):

> "Considering the nature of the trust, the sole beneficiaries thereof could have put an end to it at any time.
>
> * * * * *
>
> "* * * the interest of the beneficiaries of a trust of the nature here involved approaches so nearly to complete ownership, with all the incidents thereof, as to justify the conclusion that a license agreement entered into by all the beneficiaries may bind the trustee."

The beneficiaries of the trust under consideration in the case at bar could not end the trust at will, nor could they be considered virtually the owners of the trust res. Furthermore it is significant that in the Western Battery case all the beneficiaries participated in the acts which the defendant relied upon to bar the recovery sought by the trustee; here, on the other hand, most of the beneficiaries are not accused of wrongful conduct. Therefore the moving defendants have not shown sufficient reason for this Court to disregard either the corporation or the trust, and certainly no reason to disregard both of them.

Here as in Sauer v. Newhouse, D.N.J., 24 F.Supp. 911, complete relief can be given as between plaintiff and the defendants without joinder of other parties. The Sauer case was a representative suit by stockholder of a corporation against certain directors of the corporation; the plaintiffs prayed for restitution to the corporation for losses resulting from alleged misconduct of the defendants. The defendants moved to join two former directors who, the defendants alleged, had concurred in the wrongful acts and were indispensable parties. The court said, 24 F.Supp. at page 912:

> "The only utility in ordering the addition of the omitted parties would be the avoidance of a possible

suit for contribution instituted by those already defendants against the omitted parties in the event that judgment goes against the present defendants in this action. * * * Complete relief can be afforded plaintiffs without the addition of parties demanded. Hence, they are not necessary or indispensable." Compare Sadler v. Sadler, 9 Cir., 167 F.2d 1.

It is the opinion and conclusion of this Court that the trustee and beneficiaries of the Henry Miller Trust are not indispensable parties to this action.

Some of the defendants make a further contention with regard to absent parties. The argument is that various persons who have not been made parties to this suit are indispensable parties defendant, and their joinder as defendants would destroy diversity judisdiction because they are residents of Nevada, as is the plaintiff. These parties are alleged to be indispensable because if this Court were to order some of the defendants to reconvey to the plaintiff property that was acquired from the plaintiff, the intervening interests of the absent parties would be destroyed or adversely affected. But this argument overlooks the fact that the prayer of the First Amended Complaint is for specific relief, such as the return to plaintiff of property held by the defendants, or in the alternative for damages.

An individual who has acquired title to property by fraud has a voidable title, and has the power to convey a good title to a good faith purchaser for value. Plaintiff recognizes the possibility that the rights of innocent third persons may have intervened in some of the transactions attacked in this suit; consequently this suit is for the return of the property if that can be done without disturbing the rights of innocent parties, or for damages if the property cannot be returned.

None of the cases cited in support of defendants' contention are controlling here. In Baten v. Nona-Fletcher Mineral Co., 5 Cir., 198 F.2d 629, the relief sought was the cancellation of deeds. The court said (at pages 630-631):

"* * * the real purpose of this suit is to cancel and set aside the conveyances * * *."

There was no prayer for money damages. In Keegan v. Humble Oil & Refining Co., 5 Cir., 155 F.2d 971, the plaintiff asked to be declared owner of certain property, and to grant that relief would have destroyed an interest in that property belonging to an absent party. Calcote v. Texas Pacific Coal & Oil Co., 5 Cir., 157 F.2d 216, was a suit for cancellation of an oil lease. If the lease were cancelled, royalty interests of absent parties would have been destroyed. In Young v. Garrett, 8 Cir., 149 F.2d 223, a state statute provided that an executor or administrator, rather than the heirs of a decedent, were the only proper plaintiffs in the type of suit there involved; therefore the administrator of the decedent was held to be an indispensable party. In Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, the holding of the court on the issue of indispensable parties, and the inapplicability of that case to the situation in the case at bar, are both indicated by the following statement of the court at page 262:

> "* * * in an action wherein it is to be determined that the sublessee has committed acts which forfeit the parent lease, the sublessors, who are the owners and holders of such lease, should be parties."

In the case of State of Washington v. United States, 9 Cir., 87 F.2d 421, the court held that where the State of Washington had leased property to a private party, and the United States sued to recover possession from the lessee, claiming to be the owner of that property, that the State of Washington was an indispensable party because to grant the relief sought by the United States would be to adversely affect the interest of the State of Washington. The court said (87 F.2d at page 430):

> "The lessor is affected * * * because the thing, which he claims he owned at the time of the grant to the lessee, and which he claims will revert to him, is declared by the decree to be nonexistent."

American Insurance Co. v. Bradley Mining Co., N.D.Cal., 57 F.Supp. 545, is not even remotely similar to the case at bar. There certain parties were found to be indispensable because they had brought a similar action in a state court, and therefore there was a possibility of the issues being determined one way in the federal court and the opposite way in the state court, which would not have been equitable in the circumstances of that case.

These cases cited by the defendants generally involve a situation in which specific relief is prayed for, and to grant that relief would destroy or adversely affect the interests of an absent party. Here the prayer is for damages as an alternative form of relief. If innocent third parties have acquired interests in some of the property which plaintiff seeks; this Court can award damages in lieu of that property (in the event of an ultimate decision in favor of the plaintiff) and frame its decree so as to protect the interests of those absent parties. See Hudson v. Newell, 5th Cir., 172 F.2d 848, 850, subsequent opinion 174 F.2d 546, in which the court said:

> "A court cannot adjudicate the rights of persons who are not parties before it; they will be brought in if possible and if they will not destroy diversity. . . . If diversity will be thereby destroyed the court will not require them to be brought in, but will enquire if there is any relief it can properly give without them; if there is, it will give it without prejudice to the rights of the absent; if none can be given the suit will be dismissed."

Therefore it is the opinion of this Court that there are no absent parties who are indispensable parties defendant.

Defendants further contend that the executors of the estate of Max B. Arnold, who are defendants in this suit, are citizens of Nevada as is the plaintiff and that there is not complete diversity of citizenship between the plaintiff and all the defendants. Plaintiff has moved to dismiss the executors of the Arnold estate as parties. The executors

of the Arnold estate are not indispensable parties and therefore it is proper to permit a dismissal as to them, in order to establish the jurisdiction of this Court.

The leading case on the point in this circuit is Dollar S. S. Lines v. Merz, 9 Cir., 68 F.2d 594, 595, where the court said:

> "Where, because of the joinder of proper, though not indispensable, parties as defendants, there is not merely on the record but in fact no such diversity of citizenship as to give jurisdiction, the District Court may permit a dismissal of such parties and thereby establish jurisdiction with retroactive effect." (Citations omitted.)

See also Atchison, T. & S. F. Ry. Co. v. Franeom, 9 Cir., 118 F.2d 712; Finn v. American Fire & Casualty Co., 5th Cir., 207 F.2d 113.

Therefore plaintiff's motion to dismiss the executors of the Arnold estate will be granted.

Another basis for motions by the defendants to dismiss is that the complaint does not establish diversity jurisdiction because the plaintiff has sued a large number of fictitious parties. The recent case of Molnar v. National Broadcasting Co., 9 Cir., 231 P.2d 684 (Jan. 4, 1956), supports the defendants' contention and is controlling here.

In the Molnar case the plaintiff sued the named defendant and ten "Doe" parties. Jurisdiction of the court was predicated upon diversity of citizenship, and the complaint contained the allegation that: "Plaintiff is a citizen and resident of the State of California; defendants, and each of them, are citizens and residents of the State of Delaware." The court of appeals held:

> "If the identity of defendants were known so that the pleader could state they were citizens of Delaware, she could also state their names and allege what part each had in the management and control of the stairway. But, if the allegation that they are citizens of

> Delaware, be, as on the face of the complaint it is, unfounded guesswork, the jurisdiction of the court is not established."

The pertinent allegations of the First Amended Complaint in the case at bar are found in paragraph I of that complaint:

> "The plaintiff is a corporation incorporated under the laws of the State of Nevada. • • • The defendants Doe Thirty to Doe Two Thousand are citizens of states other than the State of Nevada."

It is obvious that the allegations pertaining to the citizenship of the "Doe" parties in the case at bar are mere guesswork, and therefore this Court must follow the Molnar case by ordering the dismissal of this action unless the plaintiff either drops the fictitious parties or identifies them with sufficient clarity so that this Court could find that actual persons are contemplated by the allegations pertaining to those parties. This action is in accord with the holding of Roth v Davis, 9 Cir., 231 F.2d 681 (Jan. 5, 1956).

Plaintiff will be allowed twenty days in which to amend its complaint in this respect.

Counsel for plaintiff are directed to prepare and submit an appropriate order.

Dated: May 15, 1956

/s/ OLIVER J. CARTER
U. S. District Judge

[Endorsed:] Filed May 15, 1956

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil Action No. 34043

MILLER & LUX INCORPORATED, a Nevada corporation,
Plaintiff,

v.

R. H. ANDERSON, ET AL., *Defendants.*

WOLLENBERG, District Judge.

Memorandum Opinion

This is an action by Miller and Lux, a Nevada corporation, to nullify certain conveyances of land by it to various defendants who are residents of states other than Nevada. As federal jurisdiction is based on diversity of citizenship, California law is controlling.

Plaintiff alleges in its second amended complaint, in support of its prayer to nullify the conveyances, that three of its directors, who were all of its shareholders, and certain other persons, including all of the defendants herein, who were transferees of the properties sold, conspired to enrich themselves and others at plaintiff's expense and to defraud plaintiff in violation of their fiduciary obligations to plaintiff by conspiring to:

1. Make profits on the purchase and sale of land without revealing to it such profits;

2. Cause it to sell lands to its officers and agents directly, or indirectly through dummies, at a price less than that which should have been obtained;

3. Conceal from it the existence of the conspiracy.

Plaintiff further alleges that it was not able to protect itself from these conspiracies and to enforce its rights at an earlier date because it was a "captive" corporation. It was "captive," plaintiff asserts, because each of its shareholders, directors and officers were either active parties to the conspiracy to defraud or were dominated by and sub-

servient to the parties to the conspiracy during its entire period.

Defendants move to dismiss the suit for failure of plaintiff to state a cause of action for which relief can be given. Plaintiff's complaint shows that all those persons who constitute plaintiff's corporate being had knowledge and approved of the transaction complained of and such approval may be found on the company's books. It is an elementary proposition of law that fraud requires complainant's lack of knowledge and that affirmance waives fraud. As stated in Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809 (1896): "The plaintiff is but the representative of its stockholders, and can have no rights in the matter other than in behalf of its stockholders; and, if all of the stockholders authorized the release, the plaintiff was not defrauded." Notice to all of the stockholders of a matter so intimately affecting their rights must be deemed notice to the corporation. What we have here, however, is more than mere notice to the corporation. We have plaintiff alleging in his complaint actual knowledge on the part of all the stockholders of the corporation who would be entitled to complain of the wrong.[1] As unanimous consent renders fraud impossible, no wrong has been done to the plaintiff.

But plaintiff also alleges in its second amended complaint that its stock was held in trust and that the beneficiaries of the trust did not ratify or have knowledge of the transaction. Plaintiff argues in his briefs that since it is the beneficiaries who are ultimately defrauded, the corporation should be allowed to sue in their behalf, as well as its own. In support of this contention plaintiff cites Dolese Bros. Co. v. Brown, 157 A. 2d 784 (1960), a Delaware case, which holds that those holding stock as trustees or agents cannot ratify a fraud upon the company without full disclosure to the beneficial owners of the stock. In Dolese, the president and dominating director of a closely held corporation obtained general powers of

[1] See generally, White v. F.D.I.C. 122 F. 2d 770, (4th Cir. 1941) cert. den. 316 U.S. 672 (1942).

attorney through fraudulent misrepresentations and concealment of certain facts from members of the family who trusted him and who were without experience and knowledge of business activities. A corporation cannot sue when all of the shareholders consent to a transaction; but the Court agreed that consent not freely given with full knowledge of the facts is not consent at all and it allowed the suit as the rights of third parties were not involved.

At bar, however, we have no fraud on the legal owners of the stock. It is the legal owners who have acted and it is they who have a legal right to act. They at no time were ever required to obtain the consent of the beneficial owners of the trust to act in their capacities as trustees or shareholders of Miller and Lux, Incorporated. They were not mere holders of proxies from the legal owners as in Dolese. Also, here, it is only the rights of third party transferees who are involved.

Stockholders who are trustees of stock are nonetheless stockholders with all the powers and rights of stockholders Their fiduciary obligations to their beneficiaries do not deprive them of their status as shareholders or make the beneficiaries shareholders in their place. They and they alone hold the legal title to stock and the right to vote it and exercise all other rights incident thereto. "Shares standing in the name of any person as * * * trustee * * * may be voted and all rights incident thereto may be exercised only by the * * * trustee * * * in person or by proxy, and without proof of authority." Cal. Corp. Code Sec. 2218.

As stated by the Supreme Court of California in Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 P. 225 (1895):

> "Some of the stock was held and voted by trustees who not only appeared upon the books of the corporation as such, but were really and in fact trustees for other persons. The contention of appellant is that a trustee of stock has no authority to destroy the corporation by merging it with another corporation. The answer to the proposition must be that the trustee

is the legal owner of the stock, and as against the corporation and all the world, except his cestui que trust, no inquiry may be had touching his actions in the premises. (Civ. Code Secs. 307, 312)."

If a wrong had been done to the corporation, its claim would be barred by the statute of limitations. Assumming the three year statute for fraud is applicable (CCP Sec. 338(4)), plaintiff alleges its complaint has been filed within the appropriate time. Plaintiff claims the discovery was not made sooner, even though the records of all the transactions involved were apparent on the company's books and were matters of public record, because it was a "captive" corporation. However, under the facts as alleged, the plaintiff herein was not a captive corporation. Lady Washington C. Co. v. Wood, as cited above, at pp. 487-9. If the five year statute of limitations for the recovery of real property were applicable (CCP Sec. 318), there is no doubt plaintiff's claim would be barred.

If it can be said that plaintiff may bring this action it is defendants' contention that plaintiff has failed to join indispensable parties whose joinder herein will destroy jurisdiction. The interest of the beneficiaries and the trustees of the Henry Miller trust must be determined. It is plaintiff's theory in this argument that it is the breach of this trust that is the foundation of his claims. There is no question that the trustees of the trust as legal owners of all of the stock in plaintiff's corporation have an interest, nor that the beneficiaries also have an interest as by plaintiff's argument they are the ones wronged by the transactions complained of. It is also to be noted that plaintiff charges in his complaint that some of the beneficiaries are wrongdoers—in fact at least one is charged as a party to the conspiracy. Therefore, there are conflicting interests among these beneficiaries which must be litigated herein. In order for this Court to enter any judgment equitable in nature, the respective positions of the various beneficiaries must be

determined.[2] It is apparent, therefore, that this action will fail on jurisdictional grounds if these indispensable parties are brought in.

For the reasons stated above defendants' motions to dismiss are hereby granted.

Pending herein is a motion of plaintiffs to substitute the personal representatives of Harry H. Magee, deceased. This motion is denied and the plaintiff's complaint dismissed as to Harry H. Magee. In view of the above order dismissing plaintiff's complaint as to the other defendants, and as the same reasons would apply to defendant Magee, it would be of no purpose to grant the motions to substitute.

Dated: March 12, 1962.

/s/ ALBERT C. WOLLENBERG,
U. S. District Judge.

[Endorsed:] Filed March 12, 1962.

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[2] See, State of Washington v. United States, 87 F. 2d 421 (9th Cir. 1936) for a discussion of the test to be applied to determine who are indispensable parties.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

June 18, 1963

No. 18,033

MILLER & LUX, INCORPORATED, a Nevada corporation, *Appellant*,

vs.

R. H. ANDERSON; GRACE C. ANDERSON; ET AL., *Appellees*.

No. 17,929

MILLER & LUX, INCORPORATED, a corporation, *Appellant*,

vs.

ALLEN L. CHICKERING, CHARLES R. BLYTH, HARRY H. FAIR, J. J. HUNTER, and THE BANK OF CALIFORNIA, a National Banking Association, *Appellees*.

On Appeal from the United States District Court for the Northern District of California, Southern Division

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Before: MADDEN, Judge of the Court of Claims, and MERRILL and BROWNING, Circuit Judges.

MADDEN, Judge:

These two appeals, which we will treat in one opinion, are from orders of the United States District Court for the Northern District of California, Southern Division, dismissing appellant's complaints. In the Anderson case the complaint names as defendants some sixty individuals, partnerships and corporations. In the Chickering case there are five defendants, four being individuals and the fifth a banking corporation. Each complaint alleges, in substance, that the appellant is a Nevada corporation, the stock of which was, at all times mentioned in the complaint, held in trust by three trustees of the Henry Miller Trust;

that, beginning at some time prior to 1927 and continuing thereafter, one J. Leroy Nickel, Jr., a trustee as well as a beneficiary of the trust, and a director and officer of the appellant; James E. Fickett, a director and the president of the appellant; J. E. Wooley, a trustee of the trust, and a director and officer of the appellant; and A. R. Olsen, a trustee of the trust and a director and officer of the appellant, acted in violation of their fiduciary obligations to the appellant, to enrich themselves and others at the expense of the appellant and to defraud the appellant. The activities of Fickett, Wooley and Olsen did not cover the entire period from 1927 to 1954, as did those of J. Leroy Nickel, Jr.

The complaints[1] recite the misdeeds and wrongs of the four persons named above as:

(1) Making and keeping profits on the purchase and sale of appellant's land and interests in land, through the use of their positions of influence and power in appellant corporation, without revealing to appellant the existence, nature and extent of such profits;

(2) Causing appellant to sell lands and interests in land to Fickett and Nickel and to various other officers and agents of appellant, directly or indirectly, through the device and by means of strawmen, dummies, nominees and by other means, at less than the price that should have been obtained by the appellant, so as to realize profits by later or simultaneous resale, lease, rent or other use of said land or interests in said land, and to retain such profits for themselves, the wrongdoers.

(3) Causing appellant to sell to themselves and others, at a price less than should have been obtained by appellant, lands and interests in land without disclosing to appellant their value as actual or potential oil and gas bearing lands, so as to realize and retain for themselves profits upon

[1] The word "complaint" in this opinion refers to the second amended complaint in the Anderson case, or the first amended complaint in the Chickering case, as the context will indicate.

later or simultaneous resale, lease, rent or other use of or dealings in the lands.

(4) Concealing from appellant and all others the existence of their conspiracy and wrongdoings.

The complaints name numerous persons who are said to have joined in the conspiracy with full knowledge of the existence and purposes of the conspiracy. Some of the persons so named are made defendants in the complaint in the Anderson case. Many of them are not made defendants. They are alleged to have caused the appellant to transfer, lease, assign or otherwise dispose of its lands and interests in lands, as more particularly described in exhibits 1 to 67 to the complaints. These exhibits contain details of conveyances, with dates, descriptions and names of grantees. The exhibits are incorporated by reference in the complaints.

A considerable number of defendants listed in paragraph XXII of the complaint in the Anderson case seem not to be charged with having knowingly joined in the conspiracy to defraud the appellant, but to be charged only with having purchased and taken their conveyances, leases, assignments and transfers "with notice or knowledge that in so purchasing, leasing or taking said lands and interests in land they were participating in and helping to accomplish the defrauding of plaintiff [appellant] and the violation of fiduciary duties owing to plaintiff [appellant] by its directors, officers, agents, and others."

The facts stated in this opinion are facts alleged by the appellant in its complaint and, in some instances, facts stated by appellant in admissions and in answers to interrogatories in these cases. There has been no occasion to introduce any proof of the facts so stated.

The complaints allege that after the various grantees named in exhibits 1 to 67 above received their conveyances, they drilled oil and gas wells on the land and took the products of these wells, and are now in possession of the lands and of the proceeds of their use.

The appellant alleges that during the many years that it was being defrauded by its directors, officers and agents, it was held completely captive and dominated by its directors and officers who were parties to the conspiracy, and was therefore powerless and unable to protect its interests. On June 13, 1954, certain beneficiaries of the Henry Miller Trust filed a suit in the Superior Court of the State of California in and for the City and County of San Francisco, the principal object of which suit was to remove J. Leroy Nickel, Jr., A. R. Olsen and J. E. Wooley, the then trustees of the Henry Miller Trust, from their positions as trustees, and to procure the appointment of successor trustees. The trustees resigned or were removed, new trustees were appointed, they as owners of the stock of appellant corporation removed J. Leroy Nickel, Jr., Olsen and Wooley as directors and officers of appellant corporation, elected an independent board of directors of appellant, which board appointed new officers. The new trustees of the Henry Miller Trust and the new directors and officers of appellant corporation promptly made an investigation which disclosed the wrongs committed against the appellant. Within three months after the appointment of the new directors and officers of the appellant, the Anderson suit was filed in 1954. The Chickering suit was not filed until 1957, because not until then did appellant discover the part which, it says, the five defendants in the Chickering case played in assisting the wrongdoing directors, officers and trustees to conceal their wrongdoings.

The complaint in the Chickering case, in its paragraph XXIX-F, alleges that directors, officers and agents of the appellant corporation purchased a large number of the appellant's bonds and notes at less than their face value and enforced them against appellant at their face value, in violation of their fiduciary obligation to the appellant.

The complaint in the Anderson case asks for a judgment and decree that the defendants hold the properties described in exhibits 1 to 67, together with all proceeds, profits and income from those properties, as constructive trustees for the appellant, and restore and return them to appel-

lant; that the defendants be required to make an accounting to the appellant of profits made at appellant's expense; that in the event that the appellant's properties have been so transferred that constructive trusts cannot be impressed upon them, the appellant have judgment against the defendants and each of them for one hundred and ten million dollars, with interest and costs, and reasonable attorneys' fees.

In the Chickering case, the relief demanded is judgment against the defendants in the amount of one hundred and ten million dollars.

The appellant corporation is a family corporation dating back to 1908. Its founder, Henry Miller, by an inter vivos transfer in 1913 and a testamentary transfer in 1916, put all the stock of the plaintiff corporation into the Henry Miller Trust, where it has remained since that time. The trust *res* of the trust is owned by three trustees. The beneficiaries of the trust, following Henry Miller's death in 1916, were his daughter Nellie Miller Nickel and her husband, J. Leroy Nickel, Sr., for their lives and the life of the survivor of them; then their children and the issue of any deceased child, per stirpes, for life, until the death of the last of the children of Nellie Miller Nickel and J. Leroy Nickel, Sr., at which time the corpus of the trust was to be distributed to the descendants of such children, per stirpes, in fee.

Henry Miller died in 1916. His daughter Nellie Miller Nickel and her husband J. Leroy Nickel, Sr., and their three children were then living. The children were J. Leroy Nickel, Jr., George W. Nickel and Beatrice Nickel Morse. J. Leroy Nickel, Sr., died in 1937 and his wife Nellie Miller Nickel died in 1944. J. Leroy Nickel, Jr., married but had no children; George W. Nickel had four children; Beatrice Nickel Morse had three children. These seven children and their descendants are the contingent remaindermen under the Henry Miller Trust.

J. Leroy Nickel, Jr., died in 1959. The other two children of Nellie Miller Nickel and J. Leroy Nickel, Sr., viz. George

W. Nickel and Beatrice Nickel Morse, were also life beneficiaries of the trust. The record does not disclose whether or not they are living. Their respective children and more remote descendants were, as we have seen, contingent remainder beneficiaries of the trust.

The complaints allege that J. Leroy Nickel, Jr., Wooley, and Olsen, as trustees of the Henry Miller Trust, owned all the stock of the appellant corporation from 1944 to 1954. They elected its directors, selected its officers, and were in complete control of its affairs. In the appellant's original complaint, filed in 1954, in the Anderson case, J. Leroy Nickel, Jr., J. E. Wooley, and A. R. Olsen headed the list of the numerous defendants against whom restitution and damages were sought. On November 19, 1954, on motion of the appellant, the action was dismissed, without prejudice, as to the defendant A. R. Olsen. In the appellant's first amended complaint filed October 31, 1955, neither Wooley nor Olsen was named as a defendant, but J. Leroy Nickel, Jr., was so named. But on appellant's motion the action was dismissed, without prejudice, as to J. Leroy Nickel, Jr., on December 20, 1955. In appellant's second amended complaint, filed on April 17, 1958, neither J. Leroy Nickel, Jr., nor Wooley nor Olsen was named as a defendant. However, in the body of the second amended complaint, as in the two earlier versions of the complaint, J. Leroy Nickel, Jr., Wooley and Olsen, together with one James E. Fickett, then deceased, were named as the persons primarily responsible for the looting of the plaintiff corporation by putting in their own pockets profits which rightfully belonged to the corporation.

From what is recounted above, one gets the impression that if the cases are tried on the present amended complaints the trial will be a playing of Hamlet, without the presence of Hamlet. There will be much evidence as to the wrongs which J. Leroy Nickel, Jr., Wooley, Olsen, and Fickett did to the appellant corporation, and as to the manner in which they profited from those wrongs, but there can be no judgment requiring those primary wrongdoers, or their estates, to disgorge the profits and reimburse the appellant corporation.

It it be said that this is none of the business of the defendants against whom judgments are sought, that a wrongdoer cannot complain that another wrongdoer, also responsible for the same tort, is not sued for it, we suppose that this doctrine is not necessarily of universal application. The instant suit seeks to impose constructive trusts and liability for damages upon numerous persons who now have title to numerous properties. As to some of them, all that is charged against them is that they took title to the property when they knew that their predecessor in title had acquired title through a breach, by a director or agent of the appellant, of his fiduciary duty to the appellant. We think a court of equity would not be performing its role as such if it assumed that the defendants included in the second amended complaint are *in pari delicto* with the primary wrongdoers named, but not made defendants in the complaint. A court of equity might well conclude that it should not require the party least at fault to bear alone the entire responsibility for the wrong.

If it is suggested that these primarily guilty actors may have paid back to the appellant corporation what they stole from it, the court and the remaining defendants would be entitled to know that. To whatever extent such payments have been made, they are *pro tanto* credits on the claims made by the appellant against the remaining defendants. If settlements have been made and releases given to the primary wrongdoers for less than full compensation for their wrongs, or for less than would have been practically recoverable, that might well be of interest to the court and to the remaining defendants.

The complaint in the Anderson case, in paragraph XI, says:

> From and after 1927 and at all times herein mentioned until July 22, 1954, each of plaintiff's [appellant's] directors and officers was either an active party to the conspiracy set out in paragraph XIII or dominated by and subservient to the parties to said conspiracy, and plaintiff was a complete captive of said directors and officers and was therefore at all times completely

powerless and unable to protect its interests and to seek a remedy for the wrongs and injuries herein above set forth until July 22, 1954.

Beginning in 1927, which was when the operation of the conspiracy began, one of the three trustee-stockholder directors of appellant was J. Leroy Nickel, Jr. As we have seen, he is alleged to have been the ringleader of the conspiracy to defraud the appellant. His position and his activities continue down to 1954, when he was removed from his position as trustee and as a director and officer of appellant. From 1929 to 1944 Nellie Miller Nickel, the daughter of Henry Miller, was one of the three trustees of the Henry Miller trust. She was a director of the appellant corporation from 1941 to 1944. She was a life beneficiary of a one-half interest in the trust from 1916 until 1937, and the sole life beneficiary from 1937 until her death in 1944. Her husband, J. Leroy Nickel, Sr., was the third trustee of the trust from 1920 until 1937. As such, he was a stockholder of appellant corporation, of which he was a director from 1920 to 1937. He was a life beneficiary, with a one-half interest, in the trust. He died in 1937. J. E. Wooley succeeded him in 1937 as a trustee of the trust and as a stockholder and director of appellant. He was not a beneficiary of the trust nor a member of the Miller family, but, as we have seen, was active in the conspiracy to defraud the appellant, until he was removed in 1954. Upon the death of Nellie Miller Nickel in 1944, A. R. Olsen succeeded her as a trustee, and as a stockholder and director of appellant, and continued in those capacities until he was removed in 1954. Upon the death of his mother, Nellie Miller Nickel, in 1944, J. Leroy Nickel, Jr., became a life beneficiary of a one-third interest in the trust. He died in 1959.

As shown in the foregoing recitals, during the period 1927 to 1937, J. Leroy Nickel, Sr., was a life tenant of a one-half interest in the Henry Miller Trust. He was a director of appellant corporation and is alleged in the complaint to have been subservient to the will of the conspirators. Nellie Miller Nickel was the sole life tenant of the

trust from 1937 to 1944. From 1941 to 1944 she was a director of appellant corporation and was subservient to the will of the conspirators. J. Leroy Nickel, Jr., was a director of appellant corporation from 1920 to 1954. Upon the death of his mother, Nellie Miller Nickel, in 1944 he became a life tenant of a one-third interest in the trust. He was, as we have seen, the ringleader in the conspiracy.

If there should be a recovery in this suit and an accounting by the defendants to the appellant for income, rents and profits earned by the defendants from the diverted lands, it would seem to follow that a part of the recovery should go to the estates of the life tenants who would have received the income, rents and profits if the appellant's land had not been fraudulently disposed of.

All the shares of the stock of the appellant were held by the three trustees of the Henry Miller Trust from as far back as 1920. They elected themselves, and some other persons, directors of appellant. In 1939 evidence of what is alleged to have been the conspiracy to despoil the appellant was presented to the board of directors in two successive meetings, was discussed, and the following resolution was adopted:

> Now, Therefore, Be it Resolved: That this matter be considered closed and no further investigation is requ[illegible].

Participating in this meeting were J. Leroy Nickel, Jr., A. R. Olsen, and J. E. Wooley, together with the other directors. Judge Sloss, a director, opposed the resolution. As we have seen, J. Leroy Nickel, Jr., was from 1920 to 1954 one of the three trustees of the Henry Miller Trust. J. E. Wooley was one of the trustees from 1937 to 1954. A. R. Olsen was the third trustee from 1944 to 1954.

Judge Wollenberg, in the district court, dismissed the appellant's complaints, assigning as one of his grounds of dismissal the fact that the owners of the appellant were shown by the allegations of the complaint to have knowingly consented to and ratified the alleged wrongs to the

corporation. He said, "As unanimous consent renders fraud impossible, no wrong has been done to the plaintiff." For that reason, he said, the complaints failed to state causes of action.

In these appeals the appellant urges that the district court was in error in failing to give weight to the fact that the three shareholder directors of appellant held their title to the stock as fiduciaries, i.e. as trustees for the beneficiaries of the Henry Miller Trust. It recognizes that "a person owning all the legal and equitable interest in a corporation may give those assets away if he desires to—ignoring the corporate entity.' He will not later, by use of the corporate entity, be heard to complain." That a corporation is hurt, or destroyed, by the intended conduct of the owners of its shares, gives rise to no legal claims, either in the shareholders, or in the corporation as a legal entity. If all of the shares of a corporation were owned by trustees, and an agent of the corporation offered some of its assets for sale at what seemed to be less than the market price, and a purchaser cautiously inquired of each of the shareholders as to whether he was aware of and content with the price at which the assets were being offered, and was assured that the shareholders were content, and thereupon made the purchase, and was later sued by the corporation for having committed a wrong against it, he would, naturally, wonder what he had done that was wrong. If he was told that what was wrong was that the shareholders did not really own the shares, but owned them as trustees for other persons, he would wonder how he was supposed to have known that. And if, in fact, he did not know it, he would not be under any liability to anyone, and certainly not to the corporation with which he had dealt. If he did know of the trusts, thereby knowing that the stockholders were being generous with assets which they did not own, he would be liable, but the wrong would not be a wrong against the corporation but against the beneficiaries of the trust. If the trustees repented of their wrong, they might, as trustees, bring suit to recover the assets, and to restore them to their place in the corporation's stock, if that was

where the court thought they belonged. Wetmore v. Porter, 92 N.Y. 76.

In the consideration of such problems, and of the particular problem of the instant cases, the corporation, as such is quite irrelevant. The questions are (1) did the trustees wrong the beneficiaries and (2) were the persons who dealt with the corporation purchasers without notice of the fact that the trustees were committing breaches of trust?

It follows from what we have said that, in our opinion, the beneficiaries of the Henry Miller Trust are the persons, and the only persons, who have rights in the instant situation. The appellant corporation was the instrument by which the conspirators despoiled the assets of the trust. It is not in the position of a repentant trustee. It was not the trustee, it was the despoiled trust res. The interposition of the corporation in this litigation is of no conceivable use. The beneficiaries have always, in equity, owned the corporation and its assets. They still own them, depleted as they are alleged to be. There is no need for this inanimate entity, the corporation, to spring to life and speak for them. They can speak for themselves. When they do speak, and when those whom they accuse answer them, the dialogue will not be obfuscated by doctrines about whether, and to what extent, the corporate veil may be pierced. Questions as to who were beneficiaries at particular times, whether their conduct was such as to make recovery for their benefit inequitable, whether and to what extent they had already been paid by the wrongdoers, would seem to be highly relevant. In brief, the obvious advantage of having the real parties in interest in court will be present.

When the frauds of the then trustees were discovered, or were first acted upon, it was the beneficiaries of the trust who brought suit, in 1954, in the Superior Court of California, which suit resulted in the removal of the unfaithful trustees and the appointment of others. That direct, nonincumbrous procedure could well have been followed by suits by the beneficiaries against the unfaithful trustees.

their confederates, agents, the appellant corporation which had been an instrument in their fraudulent acts, and purchasers who took with notice. In such a suit a court of equity could have proceeded with confidence that it could do equity.

The judgments of the district court dismissing the complaints are affirmed.

(Endorsed) Opinion Filed June 18, 1963.

Frank H. Schmid, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18,033

MILLER & LUX INCORPORATED, a Nevada corporation,
Appellant

vs.

R. H. ANDERSON, ET AL., *Appellees*

APPEAL from the United States District Court for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause dismissing the complaint be and hereby is affirmed with costs in favor of the appellees and against the appellant.

It is further ordered and adjudged that appellees recover against appellant for their costs herein expended and have execution therefor.

Filed and entered June 18, 1963

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[*Endorsed*:]
Filed
Aug. 19, 1963
Frank H. Schmid, Clerk

No. 18,033

MILLER & LUX, INCORPORATED, *Appellant*,

vs.

R. H. ANDERSON; GRACE C. ANDERSON; ET AL., *Appellees*.

No. 17,929

MILLER & LUX, INCORPORATED, *Appellant*,

vs.

ALLEN L. CHICKERING, CHARLES R. BLYTH, HARRY H. FAIR, J. J. HUNTER and THE BANK OF CALIFORNIA, a National Banking Association, *Appellees*.

Order

Before: MADDEN, Judge of the Court of Claims, and MERRILL and BROWNING, Circuit Judges

The petition for rehearing, suggestion for rehearing en banc, and motion to hear and determine applications for indemnity are denied. Judge Madden, sitting on this court by special assignment, did not participate in the consideration or disposition of the suggestion for rehearing en banc.

/s/ J. WARREN MADDEN
Judge of the Court of Claims

/s/ CHARLES M. MERRILL

/s/ JAMES R. BROWNING
United States Circuit Judges

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No. 633

Supreme Court of the United States

OCTOBER TERM, 1963

MILLER & LUX INCORPORATED, *Petitioner*,

v.

R. H. ANDERSON, et al., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF RESPONDENTS TRICO OIL AND GAS COMPANY AND GENE REID DRILLING, INC. IN OPPOSITION

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Gene Reid Drilling, Inc.

INDEX

	Page
Opinions and Orders Below	2
Question Presented	3
Rule Involved	4
Statement	4
Reasons for Denying the Writ	8
Conclusion	19
Appendix	1a

CITATIONS

Cases:

Anderson vs. *Watt*, 138 U.S. 694, 702 (1891)	Footnote, p. 7
McShan v. *Sherrill*, 283 F. 2d 462 (9th Cir. 1960)	14, 17, 18
Minneapolis R. R. Co. vs. *Peoria Ry. Co.*, 270 U.S. 580, 586 (1925)	Footnote, p. 7
Pioche Mines Consolidated v. *Fidelity-Philadelphia Trust Co.*, 202 F. 2d 944 (9th Cir. 1953)	14, 17
Shields v. *Barrow*, 58 U.S. 129, 139, 15 L. Ed. 158 (1854)	14
State of Washington v. *United States*, 87 F. 2d 421 (9th Cir. 1936)	14, 15

Federal Rules of Procedure

Federal Rule of Civil Procedure 12(b)	4

Miscellaneous:

California Code of Civil Procedure Section 338(4)	8

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BRIEF OF RESPONDENTS TRICO OIL AND GAS COMPANY AND GENE REID DRILLING, INC. IN OPPOSITION

Respondents Trico Oil and Gas Company and Gene Reid Drilling, Inc., both California corporations, oppose the petition for a writ of certiorari to review the judgment of the United States District Court of Appeals for the Ninth Circuit, entered on June 18, 1963, on the ground that the order and judgment of dismissal of action made by the United States District Court for the Northern District of California, Southern Division (Albert C. Wollenberg, J.), in Civil Action 34043,

and entered on March 30, ~~1963~~ 1962 which granted, among other motions to dismiss, the motion of these respondents to dismiss petitioner's second amended complaint for failure to join indispensable parties whose joinder would deprive the Court of jurisdiction, and for lack of jurisdiction over indispensable parties, two of whom were citizens of the State of Nevada, the state of incorporation of petitioner, and the affirmance of that judgment by the Court of Appeals, demonstrated strict adherence to the accepted and usual course of judicial proceedings.

OPINION AND ORDERS BELOW

The Order and Judgment of Dismissal of Action of the United States District of the Northern District of California, Southern Division (Albert C. Wollenberg, J.), entered ~~June~~ March 30, 1962 granting, among other motions to dismiss, the motion of respondents Trico Oil and Gas Company and Gene Reid Drilling, Inc., to dismiss petitioner's second amended complaint for failure to join indispensable parties whose joinder would deprive the Court of jurisdiction, and for lack of jurisdiction over indispensable parties (R. 898-907), is unreported. It appears in the Appendix hereto at page 1a.

Judge Wollenberg's memorandum opinion of March 12, 1962 (R. 892-898), is unreported. It appears at page 10a of the Appendix to the petition for the writ. The order made in the action by United States District Judge Oliver J. Carter granting petitioner leave to file

its second amended complaint and reserving to the respondents the right to further move to dismiss that second amended complaint for want of jurisdiction, or for want of indispensable parties (R. 543-545), is not reported. It appears in the Appendix hereto at page 10a.

QUESTION PRESENTED

These respondents do not agree with petitioner's statement of the question presented. Other respondents undoubtedly will also disagree, but so far as the motion of these respondents is concerned, the question presented is whether the granting by Judge Wollenberg, and the affirmance thereof by the Court of Appeals, of respondents' motion to dismiss petitioner's second amended complaint for want of indispensable parties defendant, two of whom were citizens of the State of Nevada, the state of incorporation of petitioner, made pursuant to a right expressly reserved by order of Court when leave was granted to petitioner to file that second amended complaint, and based upon respondents' evidence, not controverted in any respect by petitioner, showing there were absent co-owners of real property conveyed by petitioner in 1941 by a deed which petitioner claimed constituted a fraud upon it to the knowledge of all the grantees in the deed, two of whom are still co-owners, constituted such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

RULE INVOLVED

Rule 12(b) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in a responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party."

STATEMENT

Respondents' motion to dismiss arose out of the allegations of Exhibit 58 to petitioner's second amended complaint (R. 528-533). This exhibit appears in the Appendix hereto at page 13a.

Respondents' motion to dismiss, with a list of nine exhibits introduced in support of the motion and considered by the Court of Appeals on the original papers (R. 854-861), appears in the Appendix hereto at page 19a.

In paragraphs 1 and 2 of Part I of Exhibit 58, petitioner attacked, as induced by what it claimed was

a fraud upon it; a transaction by which it conveyed lands in Madera County, California, by a deed dated July 29, 1941 (R. 528-530).

At the end of paragraph XV of its second amended complaint (R. 431-432), petitioner alleged that in Part I of each exhibit to that complaint it would set out, among other details, the "names of the grantees" in the conveyances it claimed it was caused to make pursuant to what it contended was a conspiracy to defraud it of its land. When it came to Exhibit 58, however, petitioner carefully avoided naming three of the grantees in the 1941 deed it was attacking.

This was done by the device of alleging that its conveyance was to defendant (now respondent) Elmer B. Stone "and others" (R. 530).

At the hearing of respondents' motion before Judge Wollenberg on January 24, 1962, respondents introduced as Exhibit T-1 a certified copy of that 1941 conveyance made by Miller & Lux Incorporated (R. 969).[1]

Exhibit T-1 showed that the Miller & Lux conveyance of July 29, 1941 was made to "William H. Moffat, of Reno, Nevada, as to an undivided one-quarter interest, Nellie C. Harris, as to an undivided one-quarter

[1]Respondents' designation of additional certiorari records requested the Clerk of the Court of Appeals for the Ninth Circuit to include in the record on certiorari this Exhibit and eight other of respondents' exhibits which the Court of Appeals considered on the originals. This designation appears in the Appendix hereto at page 27a. The Clerk of the Court of Appeals for the Ninth Circuit forwarded these original exhibits to the Clerk of this Court on October 22, 1963.

interest, Charles S. Howard, as to an undivided one-quarter interest, and Elmer B. Stone, as to an undivided one-quarter interest, as grantees;" (R. 969). Only Elmer B. Stone was named as a party in this action.

Part II of each exhibit sets out the so-called "transferee" transaction which were secondary transactions whereby other persons acquired interests in these lands under what petitioner claimed was notice of petitioner's purported rights.

In paragraphs 11, 13 and 14 of Part II of this Exhibit 58 (R. 530-533), petitioner alleged that these respondents had acquired interests in oil and gas leases by partial assignments. These were the three oil and gas leases identified in paragraphs 1, 5 and 9 of Exhibit 58 (R. 530-532), which covered a considerable part of the lands conveyed by petitioner's 1941 deed.

Here again, petitioner carefully avoided a disclosure that William H. Moffat and May Moffat, his wife, were among the co-owners of the lands who, as lessors, joined in executing these three oil and gas leases. In paragraph 1 of Part II, this was done by alleging that the lease was executed by Elmer B. Stone and Eleanor G. Stone, his wife (R. 530). Respondents' Exhibit T-4 (R. 973) showed that William H. Moffat and May Moffat were also lessors in this lease.

In paragraphs 5 and 9 of Part II, the allegations were that the leases were from or executed by Elmer B. Stone and Eleanor G. Stone "and others" (R. 531-532). Respondents' Exhibits T-5 and T-6 (R. 975)

and Exhibit T-7 (R. 977) showed that the "and others" included William H. Moffat and May Moffat, his wife.

In Exhibit 58 petitioner alleged the date and book and page of the recording of each of these instruments in Madera County, so it knew who the "and others" were. Obviously, petitioner had to conceal the Moffats' interest in this property in order to maintain its claim of diversity jurisdiction.

Evidence was also introduced to show that the Moffats still owned their interests in the real property and in the oil and gas leases at the time of the motion, that they were citizens of the State of Nevada, that respondents still owned their interests in the oil and gas leases, that the leases were in force and effect, that gas was being produced under them, and that royalties were being paid to the lessors (Exhibit T-2, R.970; Exhibit T-3, R. 971).[2]

Petitioner did not challenge the merits of the motion in any respect. It did not introduce any evidence in opposition to the motion, nor did it make any attempt to controvert respondents' evidence in any respect.

---

[2]In their answering brief before the Court of Appeals these respondents called to the attention of the Court of Appeals that newspaper accounts published January 2, 1963, reported that William H. Moffat died on January 1, 1963, and that he was survived by his wife, May Moffat. The controlling date for determining jurisdiction of the United States District Court in diversity cases is the citizenship at the date of the commencement of the suit: *Anderson* vs. *Watt* (1891) 138 U.S. 694, 702; *Minneapolis R. R.* vs. *Peoria Ry. Co.* (1925) 270 U.S. 580, 586.

Among other motions which Judge Wollenberg also granted was a motion by these respondents to dismiss for failure to state a claim upon which relief can be granted (R. 628-632). As there were other similar motions granted at the same time, which will undoubtedly be discussed at some length in at least one other brief of respondents, no further discussion will be set out in this brief, except to comment that petitioner's second amended complaint added an Exhibit 67 (R. 539-542) which was not in petitioner's first amended complaint, which ended with Exhibit 65 (R. 198-200). Exhibit 67 alleged in Part II that respondent Trico Oil and Gas Company in 1934 acquired an interest in an oil and gas lease petitioner had executed. The second amended complaint, to which Exhibit 67 was added, was filed April 17, 1958, more than three years after the July 22, 1954 date, which petitioner concedes ended its so-called "captivity" (R. 455). Respondents' motion set up the bar of the three year statute of limitations contained in California Code of Civil Procedure Section 338(4).

REASONS FOR DENYING THE WRIT

In addition to petitioner's complete lack of any challenge directed to the merits of the indispensable parties motion of these respondents, which Judge Wollenberg granted, and its complete lack of any attempt to controvert in any way respondents' evidence in support of that motion, there are a number of other undisputed facts in the record of this case with reference to respondents' motion which demon-

strate that there was a strict adherence to the accepted and usual course of judicial procedures by Judge Wollenberg in granting this motion of respondents and by the Court of Appeals in affirming his judgment.

As petitioner indicated on page 8 of its petition, a number of motions were filed which were denied by United States District Judge Carter on May 15, 1956 (R. 368-379). These respondents filed a jurisdictional motion (R. 217-218) which Judge Carter denied. These motions were raised against petitioner's *first amended complaint* filed October 31, 1955 (R. 64-200), and subsequently superseded by a second amended complaint.

The indispensable party motion respondents filed December 20, 1961 (R. 854-860), which was heard by Judge Wollenberg on January 24, 1962 (R. 964-991), and subsequently included in the motions granted by him (R. 898-900), was raised against petitioner's *second amended complaint* filed April 17, 1958 (R. 422-542).

This second amended complaint was filed pursuant to leave granted petitioner by an order made by Judge Carter on April 17, 1958 (R. 543-545). It is included in the Appendix hereto at page 10a. This order expressly reserved to the respondents the right to further move to dismiss petitioner's second amended complaint for want of jurisdiction or for want of necessary or indispensable parties "either by formal renewal of any such motion heretofore made, or by the making

of all or any of such motions on grounds not heretofore stated" (R. 544-545).

Before Judge Carter signed that order on April 17, 1958, there was an extensive discussion at the hearing on that date regarding the right of respondents to file jurisdictional motions as to the second amended complaint. Excerpts are in the record (R. 1035-1043).

At the hearing Judge Carter made it very clear that he believed he had no right to preclude respondents from raising jurisdictional points as to the second amended complaint. At one point in the hearing counsel for these respondents asked the following question and Judge Carter made the following reply (R. 1035):

> "MR. DAVIE: Your Honor, one thing in line with the discussion you just had with Mr. Potter. I would like to have the right to determine, if this second amended complaint is filed, whether I feel it supersedes the first to the extent that I feel I should make my motion on jurisdiction over again.
>
> "THE COURT: Well, I think you should have the right to do so, but again indicating to you that I am not going to change my mind on that unless there is some sound and cogent reason for doing so."

Furthermore, when these respondents presented their indispensable parties motion to Judge Wollenberg on January 24, 1962, grounds were included in support of the motion that were not available for

presentation when their jurisdictional motion to dismiss petitioner's first amended complaint was argued before Judge Carter on December 1, 1955.

In 1955 petitioner's then counsel, Mr. John Hodgson, in opposing the jurisdictional motion of these respondents, based his argument that the Moffats and the other absent owners were not indispensable parties on the premise that they are included among . . . "literally hundreds and thousands of bona fide purchasers involved, directly or indirectly." (R. 340)

In his brief in opposition to respondents' 1955 motion to dismiss (R. 223-232), Mr. Hodgson made it very clear that he included the Moffats among these bona fide purchasers whose interests he claimed could not be affected by petitioner's complaint. He said (R. 228):

> "But, whatever interest may be returned to the plaintiff, we recognize that it must be returned subject to the rights of innocent purchasers such as the Johnsons and the Moffats."

Judge Carter's 1956 decision made it very clear that he considered that this contention of the petitioner that the Moffats and other absent owners were innocent purchasers to be the vital basis for his decision on those motions. In part he said (R. 376):

> "If innocent third parties have acquired interests in some of the property which plaintiff seeks, this Court can award damages in lieu of that

property (in the event of an ultimate decision in favor of plaintiff) and frame its decree so as to protect the interests of those absent parties."

Having thus secured a favorable decision on this jurisdictional point, petitioner then completely reversed its claim that the Moffats and the other absent owners were bona fide purchasers.

On June 6, 1958, petitioner filed its verified "Answers to Interrogatories propounded by respondent Natural Gas Corporation of California" (R. 554-567).

In its interrogatory III, respondent Natural Gas Corporation of California asked petitioner this question (R. 563):

"Interrogatory III: As to each transaction referred to in Exhibit 58, specify:

"1. Whether it is claimed that Donald C. Young, Phyllis Pearl Young, William H. Moffat, May Moffat, Charles S. Howard and Nellie C. Harris, or any thereof, were parties to the 'common scheme and design' alleged in Paragraph VII of the first amended complaint at the time of the traction or transactions to which they were party, specifying those who are claimed to have been."

Petitioner gave this answer (R. 563):

"Plaintiff claims that Donald C. Young and Phyllis Pearl Young were parties to the common

scheme and design alleged in Paragraph VII of the first amended complaint at the time of the transaction to which they were party. *Plaintiff is unable to state prior to the completion of discovery whether William H. Moffat, May Moffat, Charles S. Howard and Nellie C. Harris were parties to the common scheme and design.*" (Emphasis added)

Next, Natural Gas Corporation of California asked petitioner this question (R. 563-564):

> "As to each person named in paragraph 1 above who is not claimed to have been a member of said alleged 'common scheme and design,' is it claimed that any such person or persons had knowledge or notice of said alleged 'common scheme and design' at the time of the transaction or transactions to which they were party which would prevent such person or persons from being a bona fide purchaser, specifying each such person."

Petitioner gave this answer (R. 564):

> "Plaintiff claims that William H. Moffat, May Moffat, Charles S. Howard and Nellie C. Harris had knowledge and notice of the alleged common scheme and design at the time of the transaction or transactions to which they were party *which would prevent such persons from being bona fide purchasers.*" (Emphasis added)

In presenting the indispensable parties motion to Judge Wollenberg, these respondents cited three decisions of the United States Court of Appeals for the

Ninth Circuit involving issues as to indispensable parties: *State of Washington* vs. *United States* (9 Cir. 1936) 87 F. 2d 421; *McShan* vs. *Sherrill* (9 Cir. 1960) 283 F. 2d 462; *Pioche Mines Consolidated* vs. *Fidelity-Philadelphia Trust Co.* (9 Cir. 1953) 202 F. 2d 944. These decisions followed principles which were announced by this Court in its early decision of *Shields* vs. *Barrow* (1854) 58 U.S. 129, 139, 15 L. Ed. 158.

State of Washington vs. *United States*, supra, involved facts greatly similar to the facts involved in Exhibit 58. It was a suit by the United States to establish ownership of tide flats at the mouth of the Columbia River, and to enjoin the defendants from occupying the lands under leases from the State of Washington, which also claimed ownership and sought to intervene as an indispensable party. The Court of Appeals held that the state was an indispensable party. In doing so, it laid down certain tests of indispensability which clearly apply to the situation shown by Exhibit 58.

The Court of Appeals said first that the absent party must be interested in the controversy. Obviously, the absent co-owners here are very interested in a controversy in which petitioner claims that their title is tainted with fraud to their knowledge and that they are not bona fide purchasers.

Next, the case laid down four further tests and ruled that if any one of the tests applied the absent party was indispensable.

The first involved the point of whether the interest of the absent party is distinct and severable. Here the interest of the Moffats is not distinct or severable. The Moffat title was acquired in the same conveyance simultaneously with the title acquired by respondent Elmer B. Stone who was named a defendant.

The second test is whether in the absence of such party the Court can render justice between the parties before it. If petitioner had prevailed in the absence of the Moffats and the other co-owners, these respondents would have been ordered, according to the prayer of the complaint (R. 458-459), to "restore, return, convey and otherwise transfer to" petitioner their respective interests in three oil and gas leases. This decree, however, would not have been binding upon the absent co-owner-lessors. They could have come into court subsequently against respondents demanding that respondents pay the royalties due under the leases and perform all the other obligations of the leases.

The third test is whether the decree made, in the absence of such party, would have an injurious effect on the interest of such party. It could hardly be contended that the interests of the Moffats and other co-owners would not have been injuriously effected if petitioner had been granted the relief it sought against co-owner Stone on the ground that the deed under which he and the three other co-owners acquired title was obtained through his fraud to the knowledge of the other three grantees. It would have clouded the title of the absent co-owners, and in a State like Cali-

fornia, where insurance is a must in any real estate transaction, the absent owners unquestionably would have found their titles uninsurable. It would be no answer to say that the Court below could have framed a decree that would have taken respondent Stone's interest and protected the interests of the absent co-owners. Before a Court could do this, it would have to determine the extent of Mr. Stone's undivided interest at the time of the decree. In making such a determination the Court would necessarily be determining the interests of the remaining co-owners in their absence and without giving them their day in court to have their say as to the extent of their interests. This action would be something in the nature of a partition suit in which the interests of the absent owners in this real property would be determined without giving them an opportunity to present their version of what their interests were.

The fourth test was whether the final determination would, in the absence of such party, be consistent with equity and good conscience. The discussions under the preceding headlines all add up to the inescapable conclusion that the court below could not render a final determination in the absence of the Moffats and the other co-owners or their successors consistent with equity and good conscience. Petitioner, by attempting to conceal the names of the "and others" to the documents mentioned in Exhibit 58, chose to create a situation in which Judge Wollenberg recognized that the Court could not, in the absence of these other co-owners, render a final determination consistent with equity and good conscience.

In *Pioche Mines Consolidated* vs. *Fidelity-Philadelphia Trust Co.* (9 Cir. 1953) 202 F. 2d 944, the Court of Appeals reaffirmed the tests of indispensability set out in the *State of Washington* case, and applied those tests to hold that a suit to enforce a settlement agreement which involved members of a Debenture Holders Committee who were not joined and who were not amenable to service of process, must be dismissed for lack of jurisdiction over indispensable parties.

McShan vs. *Sherrill* (9 Cir. 1960) 293 F. 2d 462, involved a suit in the United States District Court for Arizona, brought by the Sherrills, citizens of Arizona, against the McShans, citizens of California, to quiet title to the land on the east side of the Colorado River, which they claimed by accretion and which the McShans claimed resulted from perceptible and sudden changes in the river. After the Sherrills had their title quieted, the McShans brought out evidence showing tax assessments to and payment of taxes on this land by absent parties. They requested relief under Rule 60, which was denied. The Court of Appeals remanded the case to the trial court for determination as to ownership by absent parties, and for a dismissal if their joinder would oust the Court of jurisdiction. In its opinion the Court of Appeals said at page 463 of 283 F. 2d:

> "The District Court granted the relief requested, and thereby placed a cloud upon the title of the absent land owners. A decree so affecting the

> interests of persons not joined as parties is improper."

In connection with Exhibit 58, the respondents have established the interests of the Moffats and the other co-owners without any evidence to the contrary being offered by petitioner.

In the *McShan* case the Court further at page 464 of 283 F. 2d said:

> "The absence of indispensable parties can be raised at any time, however, even by the Appellate Court on its own motion."

Under the principles established by these decisions it is clear that Judge Wollenberg could have and should have considered jurisdictional motions raised against petitioner's second amended complaint, even in the absence of Judge Carter's Order of April 17, 1958 reserving to respondents the right as to petitioner's second amended complaint to renew jurisdictional motions made to the superseded first amended complaint or make new motions. The fact is, however, that the record of this case made the right quite clear.

In the light of the evidence and these legal principles, the only ruling that Judge Wollenberg could have made was that the jurisdictional point could be raised at any time and that the Moffats and the other co-owners who had succeeded to the interests of Nellie C. Harris and Charles S. Howard were indispensable parties to this action.

CONCLUSION

From the foregoing, it appears that there has been no departure from the accepted and usual course of judicial proceedings. Respondents pray that the petition for a writ of certiorari be denied.

Dated: December 12, 1963.

Respectfully submitted,

STANLEY F. DAVIE
1540 San Pablo Avenue
Oakland 12, California

Attorney for Respondents
Trico Oil and Gas Company and
Gene Reid Drilling, Inc.

APPENDIX

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil Action No. 34043

MILLER & LUX INCORPORATED, a Nevada corporation,
Plaintiff,

v.

R. H. ANDERSON, et al., *Defendants.*

ORDER AND JUDGMENT OF DISMISSAL OF ACTION

Plaintiff having on April 17, 1958 filed its second amended complaint in the above entitled action and the motions of defendants to dismiss said action for failure to state a claim upon which relief can be granted having been duly filed, noticed and served and having been briefed and argued by the parties and submitted to the Court for decision, and the Court having considered them and having made and filed its memorandum opinion herein dated March 12, 1962, each and all of said motions are hereby granted, and it is hereby

Ordered, Adjudged and Decreed that the above entitled action be and it is hereby dismissed for the failure of the plaintiff to state a claim upon which relief can be granted.

Defendant The Ohio Oil Company and several other defendants in the above entitled action having also moved the Court to dismiss the above entitled action for the further and additional reason that plaintiff has

failed to join indispensable parties and said motions having been duly filed, noticed and served and having been briefed and argued by the parties and submitted to the Court for decision and the Court having considered them and having made and filed its aforesaid memorandum opinion herein, and it appearing to the Court that plaintiff has failed to join indispensable parties and that their joinder would defeat the Court's jurisdiction, each and all of said motions are hereby also granted, and it is hereby further

Ordered, Adjudged and Decreed that the above entitled action also be and it is hereby dismissed for the failure of the plaintiff to join indispensable parties whose joinder would defeat the Court's jurisdiction.

Plaintiff having made a motion to substitute Jerome Magee as executor of the last will of defendant Harry H. Magee, deceased, who died January 10, 1961, and said motion having been duly filed, noticed and served and having been briefed and argued by the parties and submitted to the Court for decision and the Court having considered it and having made and filed its aforesaid memorandum opinion herein, said motion is hereby denied, and it is hereby further

Ordered, Adjudged and Decreed that the above entitled action be and it is hereby dismissed as to defendant Harry H. Magee.

The Clerk of the Court is hereby directed to enter this judgment of dismissal accordingly, with costs to each of the defendants respectively as they may appear

upon proper application being made within 30 days after the entry of this judgment.

Dated: This 29th day of March, 1962.

/s/ ALBER C. WOLLENBERG,
U. S. District Judge.

The above form of order is hereby approved by the undersigned parties.

CLAYTON L. ORN,
JAMES D. ADAMS,
BURNHAM ENERSEN,
ARTHUR R. ALBRECHT,
McCARTHY, DOYLE, BROWN & ENERSEN
Attorneys for The Ohio Oil Company.

EDWIN SPRAGUE PILLSBURY,
DAVID C. DUNLAP,
Attorneys for Elmer C. Bolton.

WILLIAM E. JOHNS,
Attorney for Natural Gas Corporation of California.

LANDELS, WEIGEL AND RIPLEY,
/s/ EARL M. RIPLEY,
Attorneys for California Pacific Title Insurance Company.

/s/ GIRVAN PECK,
MORRISON, FOERSTER, HOLLOWAY, SHUMAN & CLARK,
Attorneys for Honolulu Oil Corporation and the Fickett Defendants.

LLOYD M. TWEEDT,
DERBY, COOK, QUINBY & TWEEDT,
Attorneys for R. H. Anderson and R. H. Anderson, Inc.

ATHEARN, CHANDLER & HOFFMAN,
/s/ EDWARD G. CHANDLER,
Attorneys for Elmer B. Stone.

MARION B. PLANT,
BROBECK, PHLEGER & HARRISON.
Attorneys for Union Oil Company of California.

MARTIN J. WEIL,
SIMS HAMILTON,
ADOLPH H. LEVY,
/s/ By MARTIN J. WEIL,
Attorneys for Defendants Socony Mobil Oil Company, Inc.

MARTIN J. WEIL,
ADOLPH H. LEVY,
/s/ By MARTIN J. WEIL,
Attorneys for Kettleman North Dome Association, Continental Oil Company, Seaboard Oil Company, Western States Gasoline Corporation, and C. R. Gallagher.

LAWLER, FELIX AND HALL,
MARCUS MATTSON,
JOHN M. HALL,
/s/ By MARCUS MATTSON,
Attorneys for Standard Oil Company of California.

HANNA AND MORTON,
HAROLD C. MORTON and
MAX K. JAMISON,
/s/ By MAX K. JAMISON,
Attorneys for The Superior Oil Company.

STANLEY & KIRBY,
ROBERT A. SMITH,
/s/ By PATRICK JAMES KIRBY,
Attorneys for Sunray Mid-Continent Oil Company.

ROBERT W. WALKER,
J. H. CUMMINS,
RICHARD K. KNOWLTON,
/s/ By RICHARD K. KNOWLTON,
Attorneys for Chanslor Western Oil and Development Co.

PAUL O. BROXON,
ROBERT N. BROXON,
/s/ By PAUL O. BROXON,
Attorneys for Defendant, Gulf Oil Corporation of California, (formerly Western Gulf Oil Company).

DENIO, HART, TAUBMAN & SIMPSON,
/s/ By MATTHEW C. SIMPSON,
Attorneys for Defendant, Victory Oil Company.

JUDGE JOHN B. MILLIKEN
AND JOSEPH A. BALL,
/s/ By JOSEPH A. BALL,
Attorneys for Stansbury Incorporated, and Stansbury-Webb.

MESERVE, MUMPER & HUGHES,
/s/ HEWLINGS MUMPER,
Attorneys for Kern Property Corporation.

/s/ STANLEY F. DAVIE,
Attorney for Trico Oil and Gas Company, Gene Reid Drilling, Inc., and Jerome Magee, as Executor of the Last Will of Harry H. Magee, Deceased, as a Person Sought to Be Substituted.

ROSSON & PEARSON,
WALTER M. GLEASON,
/s/ By WALTER M. GLEASON,
Attorneys for Defendants William F. Colm and Marion V. Rice.

The above form of order is hereby approved by the undersigned parties.

FREDERICK C. DOCKWEILER,
O'MELVENY & MYERS,
WILLIAM W. ALSUP,
RODNEY K. POTTER,
ALLYN O. KREPS,
/s/ By RODNEY K. POTTER,
Attorneys for Defendant Getty Oil Company.

WALTER L. ROWSE,
O'MELVENY & MYERS,
WILLIAM W. ALSUP,
RODNEY K. POTTER,
ALLYN O. KREPS,
/s/ By RODNEY K. POTTER,
Attorneys for Defendant Intex Oil Company.

O'MELVENY & MYERS,
WILLIAM W. ALSUP,
RODNEY K. POTTER,
ALLYN O. KREPS,
/s/ By RODNEY K. POTTER,
Attorneys for Defendant Moriqui Exploration Company.

O'MELVENY & MYERS,
SIDNEY H. WALL,
RODNEY K. POTTER,
ALLYN O. KREPS,
/s/ By RODNEY K. POTTER,
Attorneys for Defendants Rodney K. Potter and Elizabeth F. Potter, as Executors of the Estate of E. K. Potter, Deceased.

HAVELOCK FRASER,
O'MELVENY & MYERS,
WILLIAM W. ALSUP,
RODNEY K. POTTER,
ALLYN O. KREPS,
/s/ By RODNEY K. POTTER,
Attorneys for Defendant Signal Oil and Gas Company.

GIBSON, DUNN & CRUTCHER,
HENRY F. PRINCE,
RICHARD E. DAVIS,
MARTIN E. WHELAN, JR.,
And
O'MELVENY & MYERS,
WILLIAM W. ALSUP,
RODNEY K. POTTER,
ALLYN O. KREPS,
/s/ By RODNEY K. POTTER,
Attorneys for Defendant Lloyd Corporation, Ltd.

WILLIAM E. WOODROOF,
MERVYN W. PHELAN,
And
O'MELVENY & MYERS,
WILLIAM W. ALSUP,
RODNEY K. POTTER,
ALLYN O. KREPS,
/s/ By RODNEY K. POTTER,
Attorneys for Defendant Richfield Oil Corporation.

R. K. BARROWS and
J. A. TUCKER,
/s/ By R. K. BARROWS,
Attorneys for The Texas Company, a California corporation; Texaco Inc., a Delaware Corporation.

MCLAUGHLIN & CASEY,
/s/ By JAMES A. MCLAUGHLIN,
Attorneys for Lon V. Smith, Individually and as Executor of the Estate of Jane W. Smith.

BORTON, PETRINI, CONRON & BROWN,
/s/ By JAMES PETRINI,
Attorneys for Defendant A. J. West.

/s/ DAVID P. BARCROFT,
Attorney for Grace C. Arnold.

The above form of Order is approved by Gladys Z. Zimmerman and Charles F. Nielson as Executors of the Estate of Fritz C. Noel, Deceased.

Dated: March 20, 1962.

/s/ RONALD B. LABOWE,
Attorneys for Defendants Gladys Z. Zimmerman and Charles F. Nielson as Executors of the Estate of Fritz C. Noel, Deceased.

The above form of order is hereby approved by the undersigned party.

/s/ JOSEPH C. KIMBLE,
For Kimble & Hamlin and for Thomas Elke in behalf of the Defendant, Frank Jeppi.

The above form of order is hereby approved by plaintiff.

LAW OFFICE OF C. RAY ROBINSON,
/s/ By JOHN LOCKLEY,
Attorneys for Plaintiff.

(Endorsed): Filed March 29, 1962.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil Action No. 34043

MILLER & LUX INCORPORATED, a Nevada corporation,
Plaintiff,

VS.

R. H. ANDERSON, et al., *Defendants.*

ORDER

This cause came on to be heard on the 17th day of April, 1958, upon plaintiff's motion for leave to file a second amended complaint; and

It appearing that justice requires such leave to be given; and

It further appearing that an order should be made regulating the time for the making of, and hearing on all motions challenging the sufficiency of said second amended complaint which may be filed under Rule 12(b)(6) of the Federal Rules of Civil Procedure; and the Court being fully advised;

It Is Ordered that plaintiff be given leave to file its second amended complaint in the form attached as Exhibit "A" to its motion for leave to file said second amended complaint.

It Is Further Ordered that all motions challenging the sufficiency of the second amended complaint which may be filed under the provision of Rule 12(b)(6) of the Federal Rules of Civil Procedure shall be filed not

later than thirty (30) days after plaintiff has filed with the Clerk of this Court its answers to the interrogatories propounded by defendants R. H. Anderson and R. H. Anderson, Inc.

It Is Further Ordered that plaintiff shall file with the Clerk of this Court any brief it desires to file in response to motions challenging the sufficiency of the second amended complaint within thirty (30) days after the time within which defendants have under this order to file motions challenging the sufficiency of the second amended complaint.

It Is Further Ordered that defendants file within thirty (30) days after the time within which plaintiff has to file a reply brief any reply briefs defendants desire to file in response to plaintiff's brief.

It Is Further Ordered that all motions heretofore made by defendants to dismiss for want of jurisdiction or for want of necessary or indispensable parties or to dismiss for improper venue or to transfer the venue of this case to the United States District Court for the Southern District of California, Northern Division, be deemed made to, and they hereby are declared applicable to the second amended complaint, and it is further ordered that each and every motion so made be and the same is hereby denied, without prejudice to the right of any defendant named in said second amended complaint to further move to dismiss said second amended complaint for want of jurisdiction or for want of necessary or indispensable parties or for improper venue or to transfer the venue of this

case to the United States District Court for the Southern District of California, Northern Division, either by formal renewal of any such motion heretofore made, or by the making of all or any of such motions on grounds not heretofore stated.

It Is Further Ordered that any other motions which defendants are entitled to file under Rule 12 and which they may desire to file may be but need not be filed at this time, and the right to make such other motions under Rule 12 and other appropriate motions under other rules at a later time is expressly reserved to defendants. The time for making such other motions in the event motions under Rule 12(b)(6) are denied shall be the subject of a further order of this Court.

It Is Further Ordered that the service by mail of plaintiff's motion and the second amended complaint attached thereto shall constitute service of said second amended complaint upon defendants for all purposes in this proceeding.

All motions under Rule 12(b)(6) are now set down for oral argument on October 2, 1958, at ten o'clock a.m.

Dated: April 17, 1958.

/s/ OLIVER J. CARTER,
U. S. District Judge.

(Endorsed): Filed April 18, 1958.

MILLER & LUX INCORPORATED, a Nevada corporation,
Plaintiff,

vs.

R. H. ANDERSON, et al., *Defendants.*

EXHIBIT 58

I.

1. By agreement of sale dated February 15, 1935, between plaintiff, as seller, and one Donald C. Young, as purported purchaser, recorded August 5, 1941 in Volume 285, page 451 of the official records of Madera County, to which agreement there was attached an assignment thereof executed by the said Donald C. Young and one Phyllis Pearl Young in favor of the defendant Elmer B. Stone and others, the plaintiff was caused to contract to sell the following described parcels of land:

Parcel No. 1: Beginning at the northeast corner of Section six (6), Township twelve (12) south, Range fifteen (15) east, Mt. D.B.&M., thence South 0 16½' East, 5147.20 feet to the southeast corner of Section 6, thence South 0 20½' West 5268.55 feet to the southeast corner of section 7, thence South 89 09½' West 5289.95 feet to the southwest corner of Section 7, thence South 0 08' East 5289.00 feet to the southeast corner of Section thirteen (13), Township twelve (12) South, Range fourteen (14) East, Mt. D.B.&M., thence South 89 38½' West 4695.02

feet to the center line of Lone Willow Slough, thence along the center line of Lone Willow Slough North 72 58′ West 146.52 feet, South 73 25′ West 333.72 feet, and North 47 25′ West 72.59 feet, thence leaving Lone Willow Slough South 89 38½′ West 54.84 feet to the southwest corner of Section 13, thence North 0 04′ West 5284.50 feet to the northwest corner of Section 13, thence South 89 36′ West 4183.80 feet to a point (said point bearing North 89 36′ East 1074.39 feet from the southwest corner of Section 11), thence along a fence North 53 40′ West 4650.75 feet, North 26 43′ West 2905.23 feet to a point on the north line of Section 10, (said point bearing South 89 56½′ East 1370.84 feet from the northwest corner of Section 10), thence continuing along fence North 26 43′ West 3130.57 feet to a point on the west line of Section 3 (said point bearing North 0 45½′ West 2796.60 feet from the southwest corner of said Section 3), thence continuing along fence North 26 43′ West 2628.55 feet, thence leaving fence North 89 45½′ East 1150.95 feet to the northeast corner of Section 4, thence North 89 52½′ East 5277.90 feet to the northeast corner of Section 3, thence North 89 50′ East 5277.70 feet to the northeast corner of Section 2, thence North 89 50′ East 5277.60 feet to the northeast corner of Section one (1), Township twelve (12) South, Range fourteen (14) East, Mt. D.B.&M. thence North 89 47½′ East 5395.65 feet to the point of beginning, containing 5316.23 acres, more or less.

Parcel No. 2: The east half of the northwest quarter (E½ of NW ¼) of Section twenty-one (21), Town-

ship twelve (12) South, Range fifteen (15) East, Mt. D.B.&M., containing 80.33 acres, more or less.

2. By deed dated July 29, 1941, plaintiff was caused to convey to defendant Elmer B. Stone and others, a fee simple estate in and to the property described in the preceding item, the said deed having been recorded August 5, 1941, in volume 285, page 495, official records of Madera County.

II.

The following subsequent transferees of the foregoing land, or of interests therein, acquired title with notice of plaintiff's rights:

1. Defendant, The Texas Company, a California corporation, under an oil and gas lease dated December 2, 1940, executed by the defendants Elmer B. Stone and Eleanor G. Stone, his wife, the said lease having been recorded December 27, 1940, in volume 276, page 31, of the official records of Madera County.

2. Defendant, The Texas Company, a Delaware corporation, under an agreement dated February 15, 1943, between said company and the defendants Elmer B. Stone and Eleanor G. Stone, and others, recorded March 8, 1943, in volume 313, page 350, of the official records of Madera County.

3. Defendant, The Texas Company, a Delaware corporation, under a modification agreement between the parties to the agreement described in the preceding

item, recorded June 16, 1943, in volume 330, page 321, of the official records of Madera County.

4. Defendant, Natural Gas Corporation of California, under a lease assigned from defendant The Texas Company, a Delaware corporation, dated February 1, 1946, and recorded March 26, 1946, in volume 384, page 270, of the official records of Madera County.

5. Defendant, Natural Gas Corporation of California, under a lease dated November 15, 1946, fro defendants Elmer B. Stone and Eleanor G. Stone and others, evidenced by a Memorandum of Agreement of Lease dated November 15, 1946, and recorded March 17, 1947, in volume 401, page 291 of the official records of Madera County.

6. Defendant Natural Gas Corporation of California, under a deed dated February 10, 1947, executed by defendants Elmer B. Stone and Eleanor G. Stone and others, recorded March 29, 1947 in volume 401, page 378, of the official records of Madera County.

7. Defendant Natural Gas Corporation of California, under an oil and gas lease modification agreement dated February 1, 1949, executed by defendants Elmer B. Stone and Eleanor G. Stone, and others, recorded March 4, 1949 in volume 457, page 428, of the official records of Madera County.

8. Defendant Trico Oil and Gas Company, under an oil and gas lease dated May 24, 1949, executed by defendants Elmer B. Stone and Eleanor G. Stone, and

others, recorded June 28, 1949, in volume 463, page 434, of the official records of Madera County.

9. Defendant Harry H. Magee, under an oil and gas lease dated January 22, 1952, executed by defendants Elmer B. Stone and Eleanor G. Stone and others, recorded April 15, 1952, in volume 544, page 204, of the official records of Madera County.

10. Defendants Harry H. Magee and Juanita G. Magee, under an oil and gas lease modification agreement dated April 16, 1953, executed by defendants Elmer B. Stone and Eleanor G. Stone and others, recorded July 16, 1953 in Volume 586, page 445, of the official records of Madera County.

11. Defendant Gene Reid Drilling, Inc., under a partial assignment of an oil and gas lease dated June 5, 1953, executed by defendants Harry H. Magee and Juanita G. Magee, recorded June 10, 1953 in volume 583, page 590 of the official records of Madera County.

12. Defendants Elmer B. Stone and Eleanor G. Stone, Harry H. Magee and Juanita G. Magee, under a modification agreement dated April 16, 1953, recorded July 16, 1953, in volume 586, page 445, of the official records of Madera County.

13. Defendants Trico Oil & Gas Company, Harry H. Magee and Gene Reid Drilling, Inc., under a partial assignment of an oil and gas lease, which assignment is dated September 16, 1954 and recorded October

7, 1954, in volume 619, page 339, of official records of Madera County.

14. Defendant Trico Oil & Gas Company, under a partial assignment of an oil and gas lease, which assignment is dated August 19, 1954, and recorded December 13, 1954, in volume 624, page 14, of the official records of Madera County.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil Action No. 34043

MILLER & LUX INCORPORATED, A Nevada corporation,
Plaintiff,

VS.

R. H. ANDERSON, et al., *Defendants.*

MOTIONS OF DEFENDANTS TRICO OIL AND GAS COMPANY AND GENE REID DRILLING, INC. TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTIES WHOSE JOINDER WOULD DEPRIVE THIS COURT OF JURISDICTION, AND FOR LACK OF JURISDICTION OVER INDISPENSABLE PARTIES.

Defendant Trico Oil and Gas Company, a California corporation, and defendant Gene Reid Drilling, Inc., a California corporation, move this Court for an order dismissing this action upon the following grounds:

(1) William H. Moffat, May Moffat, his wife, Van Arsdale Lumber Co. Inc., a California corporation, Charles S. Howard, Jr., Robert Stewart Howard, Lindsay C. Howard and Marcela Zabala Fenton, formerly Marcela Zabala Howard, and Crocker-Anglo National Bank of San Francisco, formerly Crocker First National Bank of San Francisco, as trustees under the Last Will and Testament of Charles S. Howard, deceased, Eleanor G. Stone, Chowchilla Gas Company, a California corporation, and Pacific Gas and Electric Company, a California corporation, are indispensable parties to this action by reason of their interests in the controversy.

(2) Said William H. Moffat and May Moffat, his wife, are now and have been continuously since September 10, 1954, and prior thereto, citizens of the State of Nevada, the state of incorporation of the plaintiff Miller & Lux Incorporated, a Nevada corporation.

(3) The interests of said indispensable parties are aligned with these moving defendants.

(4) Said William H. Moffat and May Moffat, his wife, cannot be joined as parties without depriving this court of jurisdiction, which is based solely upon diversity of citizenship.

(5) This Court lacks jurisdiction over said William H. Moffat and May Moffat, his wife, who are not amenable to service in the State of California and could not be brought in by process of this Court.

This motion is based upon the following:

(a) Supplemental affidavit of Joseph W. Hendrick in support of this motion, filed herewith.

(b) Affidavit of said Joseph W. Hendrick dated November 17, 1955 attached as Exhibit A to the motion of defendants Trico Oil and Gas Company and Gene Reid Drilling, Inc., and the then defendant Harry H. Magee, to dismiss for failure to join indispensable parties whose joinder will deprive this Court of jurisdiction, filed in this action on November 21, 1955, as Document 173, and served personally or by mail on

November 19, 1955 and November 21, 1955, on all parties who had then appeared personally or by attorney. Accordingly, as indicated to be agreeable to the Court and counsel at the hearing on November 21, 1955, a copy of this affidavit is attached only to the original of this motion.

(c) Supplemental affidavit of Elmer B. Stone as to citizenship of William H. Moffat and May Moffat.

(d) Affidavit of said Elmer B. Stone as to citizenship of William H. Moffat and May Moffat dated November 16, 1955, attached as Exhibit B to said Document 173, filed and served as above indicated. Accordingly, a copy of said affidavit is attached only to the original of this motion.

(e) The following exhibits which were introduced on December 1, 1955, at the hearing of the motion to dismiss filed on November 21, 1955, as Document 173. All of said exhibits are in the custody of the Clerk of this Court:

Exhibit A—Certified copy of a deed dated July 29, 1941, recorded August 5, 1941, in Vol. 295, page 495, Official Records of Madera County, California, by which Miller & Lux Incorporated conveyed the land described in Exhibit 58 to plaintiff's Second Amended Complaint, to William H. Moffat of Reno, Nevada, as to an undivided one-quarter interest, Nellie C. Harris, as to an undivided one-quarter interest Charles S. Howard, as to an undivided one-quarter interest, and Elmer B. Stone, as to an undivided one-quarter interest.

A copy of this deed was also attached as Exhibit B-1 to said Document 173 filed and served as above indicated. Accordingly, a copy is attached only to the original of this motion.

Exhibit C—Certified copy of an oil and gas lease dated January 22, 1952, recorded April 15, 1952, in Vol. 544, page 204, Official Records of Madera County, California, by which William H. Moffat and May Moffat, his wife, Nellie C. Harris, by her attorney in fact, C. A. Needham, Elmer B. Stone and Eleanor G. Stone, his wife, and Estate of Charles S. Howard, by Crocker First National Bank of San Francisco, and Marcela Zabala Howard, Charles S. Howard, Jr., Lindsay C. Howard and Robert Stewart Howard, as Executors of the Will of Charles S. Howard, deceased, leased a part of the land described in Exhibit 58 to plaintiff's Second Amended Complaint, to decedent Harry H. Magee. A copy of this lease was also attached as Exhibit A-1 to said Document 173, filed and served as above indicated. Accordingly, a copy is attached only to the original of this motion.

Exhibit D—Certified copy of a modification agreement dated April 16, 1953, recorded July 16, 1953, in Vol. 586, page 445, Official Records of Madera County, California, between the parties listed in Exhibit C, as lessors, and Harry H. Magee and Juanita G. Magee, his wife, as lessees, correcting the description of the land excepted therefrom as to a 40 acre parcel. A copy of this modification agreement was attached as Exhibit A-2 to said Document 173, filed and served as above

indicated. Accordingly, a copy is attached only to the original of this motion.

Exhibit F—Security Title Insurance Company November 21, 1955 report No. 45720 of its examination of the Official Records of the County of Madera, State of California, covering the real property described in Exhibit 58 up to October 31, 1955, sworn to by Berl DeWitt, Vice President of said Title Insurance Company. An amended affidavit dated December 6, 1955 will also be offered to show that the title search was to October 31, 1955 instead of August 31, 1955, as inadvertently recited in the affidavit that was filed with report 45720 as an exhibit.

Exhibit G—Certified copy of a memorandum of an oil and gas lease dated November 15, 1946, recorded March 17, 1947, in Vol. 401, page 291, Official Records of Madera County, California, by which William H. Moffat and May Moffat, his wife, Charles S. Howard and Marcela Z. Howard, his wife, Nellie C. Harris, and Elmer B. Stone and Eleanor G. Stone, his wife, leased a part of the land described in Exhibit 58 of plaintiff's Second Amended Complaint, to Natural Gas Corporation of California.

Exhibit H—Original of the oil and gas lease identified in Exhibit G.

Exhibit J—Quitclaim deed dated November 13, 1951, recorded February 26, 1952, in Vol. 541, page 66, Official Records of Madera County, California, by which the lease identified in Exhibits G and H was

quitclaimed and surrendered by Natural Gas Corporation of California, except as to 640 acres.

Exhibit K—Certified copy of an oil and gas lease dated December 2, 1940, recorded December 27, 1940, in Vol. 276, page 31, Official Records of Madera County, California, by which William H. Moffat and May Moffat, his wife, and Charles S. Howard and Marcela Z. Howard, his wife, and Elmer G. Stone and Eleanor G. Stone, his wife, leased a part of the land described in Exhibit 58 to plaintiff's Second Amended Complaint to The Texas Company, a California corporation, with an attached consent of plaintiff to the execution of the lease. A copy of this lease was attached as Exhibit A-3 to said Document 173, filed and served as above indicated. Accordingly, a copy is attached only to the original of this motion.

Exhibit M—Partial surrender and quitclaim deed dated December 18, 1944, recorded August 3, 1945, in Vol. 363, page 104, Official Records of Madera County, California, by which The Texas Company, a Delaware corporation, having acquired the rights of The Texas Company, a California corporation, and The Texas Company, a California corporation, subject to certain reservations, surrendered and relinquished all right, title and interest in the lease identified in Exhibit K, except as to 160.80 acres.

Exhibit P—Original gas sales agreement dated July 9, 1954, by which Trico Oil and Gas Company, Harry H. Magee, Harry H. Magee, Jr., Jerome Magee,

Gene Reid Drilling, Inc., F. H. Peavey & Company, and Walter D. Brown, as sellers, agreed to sell gas produced from the land covered by the foregoing leases, and other leases, to Coast Counties Gas and Electric Company, a California corporation.

(f) Plaintiff's Second Amended Complaint on file herein.

(g) Plaintiff's answers to interrogatories III-1 and III-2 on page 8 of its answers to interrogatories propounded to plaintiff by Natural Gas Corporation of California, and filed as Document 462 on June 6, 1958.

(h) The attached memorandum of points and authorities.

Dated: December 20, 1961.

s/ STANLEY F. DAVIE
Attorney for Defendants Trico Oil and Gas Company and Gene Reid Drilling, Inc.

Certificate of Service attached.

(Endorsed): Filed December 20, 1961.

The following exhibits to foregoing motion were considered on the original papers:

Exhibit T-1: Certified copy of conveyance dated July 20, 1941 and recorded August 5, 1941.

Exhibit T-2: Supplemental affidavit of Elmer B. Stone executed December 13, 1961; with attached conformed copy of affidavit of Elmer B. Stone executed November 16, 1955 and marked Exhibit B; and attached copy of deed of July 29, 1941.

Exhibit T-3: Supplemental affidavit of Joseph W. Hendrick dated December 14, 1961, with a conformed copy of his affidavit of November 17, 1955, marked as Exhibit A.

Exhibit T-4: Certified copy of lease of December 2, 1940 with attached consent to execution of lease recorded December 27, 1940.

Exhibit T-5: Certified copy of Memorandum of Oil and Gas Lease dated November 15, 1946.

Exhibit T-6: Unrecorded full original of oil and gas lease of November 15, 1946.

Exhibit T-7: Certified copy of oil and gas lease dated January 22, 1952.

Exhibit T-8: Report of Title No. 45720, made by Security Title Insurance Company.

Exhibit T-9: Original July 9, 1954 gas sales agreement.

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(Endorsed) Filed Oct. 25, 1963
Frank H. Schmid, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

MILLER & LUX INCORPORATED, *Appellant*, vs. R. H. ANDERSON, et al., *Appellees.*	No. 18,033

DESIGNATION OF ADDITIONAL CERTIORARI RECORDS

TO THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Respondents Trico Oil and Gas Company and Gene Reid Drilling, Inc., hereby request that in your preparation of the certiorari records in the above captioned case you include, in addition to the documents requested by appellant, the following exhibits which were introduced in evidence on January 24, 1962, at the hearing before Hon. Albert C. Wollenberg, United States District Judge, of the "Motions of Defendants Trico

Oil and Gas Company and Gene Reid Drilling, Inc., to Dismiss For Failure to Join Indispensable Parties Whose Joinder Would Deprive This Court of Jurisdiction, and For Lack of Jurisdiction Over Indispensable Parties":

Exhibit No.	Exhibit
T-1	Deed 7 29 41, Miller & Lux Incorporated to William H. Moffat, Nellie C. Harris, Charles S. Howard, and Elmer B. Stone.
T-2	Affidavit of Elmer B. Stone.
T-3	Supplemental Affidavit of Joseph W. Hendrick.
T-4	Certified copy of lease by William H. Moffat and May Moffat, his wife, and Charles S. Howard and Marcela Z. Howard, his wife, and Elmer B. Stone and Eleanor G. Stone, his wife, to The Texas Company, dated December 2, 1940.
T-5	Certified copy of Memorandum of Lease dated November 15, 1946, by William H. Moffat and May Moffat, his wife; Charles S. Howard and Marcela Z. Howard, his wife; Nellie C. Harris; and Elmer B. Stone and Eleanor G. Stone, his wife, to Natural Gas Corporation of California.
T-6	Original of lease dated November 15, 1946, by William H. Moffat and May Moffat, his

wife; Charles S. Howard and Marcela Z. Howard, his wife, Nellis C. Harris; and Elmer B. Stone and Eleanor G. Stone, his wife, to Natural Gas Corporation of California.

T-7 Certified copy of oil and gas lease dated January 22, 1952, made to Harry H. Magee by William H. Moffat and May Moffat, Nellie C. Harris, Elmer B. Stone, Eleanor G. Stone and the Estate of Charles S. Howard, deceased, by the executors of his Will.

T-8 Security Title Insurance Company title report No. 45720, dated November 21, 1955, covering land described in Exhibit 58 to appellant's Second Amended Complaint.

T-9 Gas Sales Agreement dated July 9, 1954, made to Coast Counties Gas and Electric Company.

The foregoing documents are among the exhibits which this Court, by its Order dated July 23, 1962, permitted appellant to proceed on the original exhibits without the necessity of including them in the record to be printed.

Dated: October 24, 1963.

STANLEY F. DAVIE,
Attorney for Respondents Trico Oil and Gas Company and Gene Reid Drilling, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 633

WILLIAM & LUX INCORPORATED, *Petitioner*,

v.

R. H. ANDERSON, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INDEX

	Page
Opinions Below	1
Questions Presented	2
Only State Law Involved	2
Statement	3
Reasons for Not Granting Certiorari	7
A. Court Did Not Hold What Petitioner Says It Held	7
B. Judgments Are Based On Other Independent Grounds	9
C. Issue of Substitution Not Raised Below—No Validity To Argument	10
The Trustees and Beneficiaries Are Alone To Blame If Their Claim Is Barred	16
Conclusion	18

CITATIONS

CASES:

Aarhus Oliefabrik A/S v. A. O. Smith Corp., 22 F.R.D. 33, 35 (E.D. Wis. 1958)	16
American Fid. & Cas. Co. v. All American Bus Lines, 190 F. 2d 234 (10th Cir. 1951)	14
Austin v. Massachusetts Bonding & Ins. Co., 56 Cal. 2d 596, 364 P. 2d 681 (1961)	14
Baker v. Littman, 138 Cal. App. 2d 510, 515, 292 P. 2d 595, 598 (1956)	15
Bourdieu v. Pacific Western Oil Co., 299 U.S. 65, 70 (1936)	9
Carey, et al. v. Brown, 92 U.S. 171, 172 (1875)	12
Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947)	11
Dubbers v. Goux, 51 Cal. 153, 155 (1875)	15
Ellis v. Dixon, 349 U.S. 458, 460 (1955)	11

Page

Gutensohn v. Kansas City Southern Ry. Co., 140 F. 2d 950, 952 (8th Cir. 1944) 10
Hackner v. Guaranty Trust Co., 117 F. 2d 95 (2nd Cir. 1941) 14
Hormel v. Helvering, 312 U.S. 552, 556 (1941) 11
Klopstock v. Superior Court, 17 Cal. 2d 13, 108 P. 2d 906 (1941) 14
Mitau v. Roddan, 149 Cal. 1, 7-8, 84 Pac. 145, 147 (1906) 12
Monrosa, The v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959) 9
National Maritime Union of America v. Curran, 87 F. Supp. 423, 428 (S.D.N.Y. 1949) 16
Owens v. Union Pacific R. Co. 319 U.S. 715, 724 (1943) 11
St. Paul Fire and Mar. Ins. Co. v. Continental Bldg. Op. Co., 137 F. Supp. 493, 494-495 (W.D. Mo. 1956) 16
Schram v. Poole, 97 F. 2d 566, 572 (9th Cir. 1938) 16
Schwartz v. The Olympic, Inc., 74 F. Supp. 800, 801 (D. Del. 1947) 16
Shenberg v. DeGarmo, 61 Cal. App. 2d 326, 331, 143 P. 2d 74, 77 (1943), hrng. den. 15
Stickel v. United States, 76 S. Ct. 1067, 1 L. Ed. 2d 30 (1956); not officially reported 9
Stone v. James, 142 Cal. App. 2d 738, 740, 299 P. 2d 305, 307 (1956) 16
Straube v. Security First Nat. Bank of Los Angeles, 205 Cal. App. 2d 352, 361, 23 Cal. Rptr. 213, 219 (1962) 12
Thompson v. Palmer Corp., 138 Cal. App. 2d 387, 396, 291 P. 2d 995, 1001 (1956) 16
United States v. Fleischman, 339 U.S. 349, 365 (1950) 11
Walters v. City of St. Louis, Mo., 347 U.S. 231, 233 (1954) 11
Ward v. Oakley Co., 125 Cal. App. 2d 840, 851-852, 271 P. 2d 536, 543-544 (1954) 16
Weighel v. United States, 47 Ct. Cl. 528 (1912) 16
Wennerholm v. Stanford University School of Medicine, 20 Cal. 2d 713, 128 P. 2d 522 (1942) 14

California Statutes:

California Code of Civil Procedure, Sections 312, 335, 338(4) 16
California Corporations Code, Section 2218 4

Page

FEDERAL RULES OF CIVIL PROCEDURE:

Federal Rule of Civil Procedure 19 ..... 2, 7, 8

REVISED RULES OF THE SUPREME COURT:

Rule 23(1)(c) 9, 10

MISCELLANEOUS:

Bogert, Trusts and Trustees (2d ed.) § 593, p. 277 ... 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 633

MILLER & LUX INCORPORATED, *Petitioner*,

v.

R. H. ANDERSON, ET AL., *Respondents*.

BRIEF FOR RESPONDENTS IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPINIONS BELOW

The opinions of the District Court and the Court of Appeals are copied in the appendix to the petition for certiorari (Appdx. Pet.). The first opinion (Carter, J.) is not the opinion on which the District Court (Wollenberg, J.) entered the judgment appealed from, and petitioner is incorrect in saying (p. 2) that Judge Wollenberg reversed Judge Carter. The first opinion (Carter, J.) related to the first amended complaint, but that complaint was superseded by the second amended complaint which contained different allegations and raised different questions.

The opinion of the Court of Appeals shows that two appeals by petitioner were disposed of in a single

opinion, each appeal involving the same transactions, the same issues, and the same appellant, but different groups of appellees. Petitioner seeks certiorari only in this, the *Anderson* case, having abandoned its petition for certiorari in the *Chickering* case after the record was filed in this Court.

QUESTIONS PRESENTED

1. Did the Court of Appeals actually hold what petitioner argues it held on indispensable parties? *Infra* pp. 7-9.

2. If it did and in so doing erred, should certiorari be granted where the Courts below correctly ordered the action dismissed on two independent and alternate grounds, neither of which is challenged or presented in the petition as a question for review? *Infra* p. 9.

3. Must this Court decide, under the single question presented, whether some expression in the opinion of the Court of Appeals prevented petitioner from seeking leave to substitute other parties for it as plaintiffs, where petitioner not only did not seek such leave in either Court below to substitute such parties, but actually opposed all efforts to bring them into this action on the ground that their joinder would destroy diversity jurisdiction, and they were not indispensable parties anyway? *Infra* pp. 10-15.

ONLY STATE LAW INVOLVED

The decisions below were bottomed on California law. Contrary to petitioner's contentions, Rule 19, Federal Rules of Civil Procedure, was neither discussed, cited, nor involved in the opinion of the Court of Appeals.

STATEMENT

The grounds on which the Courts below based their judgments of dismissal are more fully and accurately stated in their opinions than in the petition for certiorari. Many of the statements of petitioner are designed to make it appear that its claim is highly meritorious, and that frauds of the worst kind were perpetrated on it during a quarter of a century. Suffice it to say that petitioner, by not presenting the question, admits it had no claim, and lets stand unchallenged the holdings of the Courts below that its pleadings showed that no fraud had been committed on it because they showed that all of those persons who constituted its "corporate being had knowledge and approved of the transaction complained of and such approval may be found on the company's books." (Appdx. Pet. p. 11a.)

This action was brought by petitioner, a corporation, to nullify 59 ancient deeds. The gravamen of the complaint was that some of its agents and employees had made and retained profits when they resold the lands conveyed in the 59 different deeds to them and to others. The profits, however, were alleged to have been made and retained by them with the knowledge and approval of all petitioner's stockholders, directors and officers. Its stockholders were the trustees of the Henry Miller Trust, who as trustees owned all of petitioner's stock. (R. 425-433, 38, 40-41, 88-90, 991, 595-605, 753-755, 455-458, R. vol. 4, pp. 17-20, 329-331.)

The District Court dismissed the action for failure to state a claim and to state a claim not barred by the statutes of limitations. In so doing it said: "Plaintiff's complaint shows that all those persons who constitute plaintiff's corporate being had knowledge and

approved of the transaction complained of and such approval may be found on the company's books. It is an elementary proposition of law that fraud requires complainant's lack of knowledge and that affirmance waives fraud. * * * Notice to all of the stockholders of a matter so intimately affecting their rights must be deemed notice to the corporation. What we have here, however, is more than mere notice to the corporation. We have plaintiff alleging in his complaint actual knowledge on the part of all the stockholders of the corporation who would be entitled to complain of the wrong. As unanimous consent renders fraud impossible, no wrong has been done to the plaintiff." (Appdx. Pet. 11a.)

Moreover, the Court would make no distinction between knowledge and consent of stockholders who are trustees and stockholders who are not trustees. It said: "Stockholders who are trustees of stock are nonetheless stockholders with all the powers and rights of stockholders. Their fiduciary obligations to their beneficiaries do not deprive them of their status as shareholders or make the beneficiaries shareholders in their place. They and they alone hold the legal title to stock and the right to vote it and exercise all other rights incident thereto. 'Shares standing in the name of any person as * * * trustee * * * may be voted and all rights incident thereto may be exercised only by the * * * trustee * * * in person or by proxy, and without proof of authority.' Cal. Corp. Code Sec. 2218." (Id. p. 12a.)

Petitioner necessarily recognizes the correctness of the holding of the District Court on these two points for it says it does not tender, as an independent ground supporting the exercise of this Court's cer-

tiorari jurisdiction, the holding on the points. (Pet. pp. 13-14).

The District Court went on to hold that petitioner's claim must be dismissed for another reason, giving as the reason that if petitioner ever had a claim the claim was barred by the statutes of limitations of California before this action was brought (id. p. 13a). Again, petitioner nowhere in its petition contends the Courts below erred in holding its claim was barred.

Petitioner at times contended in the Courts below that the action of its stockholders in consenting to and approving the transactions was not binding on it because its stockholders were trustees who had breached their fiduciary duties to the beneficiaries of the Henry Miller Trust when they consented to and approved the transactions. At other times, it denied that it had "ever suggested that it was the breach of the Henry Miller Trust which was in question."[1] The District Court finally disposed of the petitioner's conflicting positions by holding as a further and additional ground for dismissing the complaint that even if petitioner had a claim which arose out of the trustees' breaching a fiduciary duty to the beneficiaries of the Henry Miller Trust when they consented to and approved the corporate transactions, nevertheless the trustees and beneficiaries of the Trust would be indis-

[1] In petitioner's Opening Brief in the Court of Appeals it said at pp. 60-61: "Nowhere in the complaint nor in oral argument nor in written argument has appellant ever suggested that it was the breach of the Henry Miller Trust which was in question. This suggestion has come solely from the appellees who have at every opportunity attempted to contort appellant's position. This is a *corporate* action, brought by the *corporation* for the breach by its fiduciaries of their duty to the corporation. The defendants may also be guilty of wrongs to others but that is completely irrelevant."

Conclusion.

Petitioner does not really challenge the propriety of either the District Court or the Court of Appeals' decision that petitioner is not a wronged party and has no standing to assert the claims it has attempted to assert. Instead it seeks to invoke this Court's power of supervision to correct alleged departure from the usual course of judicial proceedings. Petitioner seeks to do this as protector of alleged rights of the trustees and beneficiaries of the Henry Miller Trust to be substituted as plaintiffs despite the fact they have made no effort on their own part at any stage of the proceedings to assert any such rights. Judgments of the Court of Appeals and of the District Court should not be disturbed because of their failure to act upon contentions not presented to them or to afford remedies which they had no power to give without application having been made therefor by such parties. The petition should be denied.

Respectfully submitted.

RODNEY K. POTTER,

Attorney for Appellees, Lloyd Corporation, Ltd., Richfield Oil Corporation, Signal Oil & Gas Company, Moriqui Exploration Company, Intex Oil Company, Getty Oil Company and Rodney K. Potter and Elizabeth F. Potter as Executors of the Estate of E. K. Potter, Deceased.

Office-Supreme Court, U.S.
FILED
DEC 18 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 633

MILLER & LUX INCORPORATED, *Petitioner*,

v.

R. H. ANDERSON, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INDEX

	Page
Opinions Below	1
Questions Presented	2
Only State Law Involved	2
Statement	3
Reasons for Not Granting Certiorari	7
A. Court Did Not Hold What Petitioner Says It Held	7
B. Judgments Are Based On Other Independent Grounds	9
C. Issue of Substitution Not Raised Below—No Validity To Argument	10
The Trustees and Beneficiaries Are Alone To Blame If Their Claim Is Barred	16
Conclusion	18

CITATIONS

CASES:

Aarhus Oliefabrik A/S v. A. O. Smith Corp., 22 F.R.D. 33, 35 (E.D. Wis. 1958)	16
American Fid. & Cas. Co. v. All American Bus Lines, 190 F. 2d 234 (10th Cir. 1951)	14
Austin v. Massachusetts Bonding & Ins. Co., 56 Cal. 2d 596, 364 P. 2d 681 (1961)	14
Baker v. Littman, 138 Cal. App. 2d 510, 515, 292 P. 2d 595, 598 (1956)	15
Bourdieu v. Pacific Western Oil Co., 299 U.S. 65, 70 (1936)	9
Carey, et al. v. Brown, 92 U.S. 171, 172 (1875)	12
Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947)	11
Dubbers v. Goux, 51 Cal. 153, 155 (1875)	15
Ellis v. Dixon, 349 U.S. 458, 460 (1955)	11

	Page
Gutensohn v. Kansas City Southern Ry. Co., 140 F. 2d 950, 952 (8th Cir. 1944)	10
Hackner v. Guaranty Trust Co., 117 F. 2d 95 (2nd Cir. 1941)	14
Hormel v. Helvering, 312 U.S. 552, 556 (1941)	11
Klopstock v. Superior Court, 17 Cal. 2d 13, 108 P. 2d 906 (1941)	14
Mitau v. Roddan, 149 Cal. 1, 7-8, 84 Pac. 145, 147 (1906)	12
Monrosa, The v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959)	9
National Maritime Union of America v. Curran, 87 F. Supp. 423, 428 (S.D.N.Y. 1949)	16
Owens v. Union Pacific R. Co. 319 U.S. 715, 724 (1943)	11
St. Paul Fire and Mar. Ins. Co. v. Continental Bldg. Op. Co., 137 F. Supp. 493, 494-495 (W.D. Mo. 1956)	16
Schram v. Poole, 97 F. 2d 566, 572 (9th Cir. 1938)	16
Schwartz v. The Olympic, Inc., 74 F. Supp. 800, 801 (D. Del. 1947)	16
Shenberg v. DeGarmo, 61 Cal. App. 2d 326, 331, 143 P. 2d 74, 77 (1943), hrng. den.	15
Sticker v. United States, 76 S. Ct. 1067, 1 L. Ed. 2d 30 (1956), not officially reported	9
Stone v. James, 142 Cal. App. 2d 738, 740, 299 P. 2d 305, 307 (1956)	16
Straube v. Security First Nat. Bank of Los Angeles, 205 Cal. App. 2d 352, 361, 23 Cal. Rptr. 213, 219 (1962)	12
Thompson v. Palmer Corp., 138 Cal. App. 2d 387, 396, 291 P. 2d 995, 1001 (1956)	16
United States v. Fleischman, 339 U.S. 349, 365 (1950)	11
Walters v. City of St. Louis, Mo., 347 U.S. 231, 233 (1954)	11
Ward v. Oakley Co., 125 Cal. App. 2d 840, 851-852, 271 P. 2d 536, 543-544 (1954)	16
Weighel v. United States, 47 Ct. Cl. 528 (1912)	16
Wennerholm v. Stanford University School of Medicine, 20 Cal. 2d 713, 128 P. 2d 522 (1942)	14
California Statutes:	
California Code of Civil Procedure, Sections 312, 335, 338(4)	16
California Corporations Code, Section 2218	4

Page

FEDERAL RULES OF CIVIL PROCEDURE:

Federal Rule of Civil Procedure 19 ..... 2, 7, 8

REVISED RULES OF THE SUPREME COURT:

Rule 23(1)(c) 9, 10

MISCELLANEOUS:

Bogert, Trusts and Trustees (2d ed.) § 593, p. 277 ... 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 633

MILLER & LUX INCORPORATED, *Petitioner*,

v.

R. H. ANDERSON, ET AL., *Respondents*.

BRIEF FOR RESPONDENTS IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPINIONS BELOW

The opinions of the District Court and the Court of Appeals are copied in the appendix to the petition for certiorari (Appdx. Pet.). The first opinion (Carter, J.) is not the opinion on which the District Court (Wollenberg, J.) entered the judgment appealed from, and petitioner is incorrect in saying (p. 2) that Judge Wollenberg reversed Judge Carter. The first opinion (Carter, J.) related to the first amended complaint, but that complaint was superseded by the second amended complaint which contained different allegations and raised different questions.

The opinion of the Court of Appeals shows that two appeals by petitioner were disposed of in a single

opinion, each appeal involving the same transactions, the same issues, and the same appellant, but different groups of appellees. Petitioner seeks certiorari only in this, the *Anderson* case, having abandoned its petition for certiorari in the *Chickering* case after the record was filed in this Court.

QUESTIONS PRESENTED

1. Did the Court of Appeals actually hold what petitioner argues it held on indispensable parties? *Infra* pp. 7-9.

2. If it did and in so doing erred, should certiorari be granted where the Courts below correctly ordered the action dismissed on two independent and alternate grounds, neither of which is challenged or presented in the petition as a question for review? *Infra* p. 9.

3. Must this Court decide, under the single question presented, whether some expression in the opinion of the Court of Appeals prevented petitioner from seeking leave to substitute other parties for it as plaintiffs, where petitioner not only did not seek such leave in either Court below to substitute such parties, but actually opposed all efforts to bring them into this action on the ground that their joinder would destroy diversity jurisdiction and they were not indispensable parties anyway? *Infra* pp. 10-15.

ONLY STATE LAW INVOLVED

The decisions below were bottomed on California law. Contrary to petitioner's contentions, Rule 19, Federal Rules of Civil Procedure, was neither discussed, cited, nor involved in the opinion of the Court of Appeals.

STATEMENT

The grounds on which the Courts below based their judgments of dismissal are more fully and accurately stated in their opinions than in the petition for certiorari. Many of the statements of petitioner are designed to make it appear that its claim is highly meritorious, and that frauds of the worst kind were perpetrated on it during a quarter of a century. Suffice it to say that petitioner, by not presenting the question, admits it had no claim, and lets stand unchallenged the holdings of the Courts below that its pleadings showed that no fraud had been committed on it because they showed that all of those persons who constituted its "corporate being had knowledge and approved of the transaction complained of and such approval may be found on the company's books." (Appdx. Pet. p. 11a.)

This action was brought by petitioner, a corporation, to nullify 59 ancient deeds. The gravamen of the complaint was that some of its agents and employees had made and retained profits when they resold the lands conveyed in the 59 different deeds to them and to others. The profits, however, were alleged to have been made and retained by them with the knowledge and approval of all petitioner's stockholders, directors and officers. Its stockholders were the trustees of the Henry Miller Trust, who as trustees owned all of petitioner's stock. (R. 425-433, 38, 40-41, 88-90, 991, 595-605, 753-755, 455-458, R. vol. 4, pp. 17-20, 329-331.)

The District Court dismissed the action for failure to state a claim and to state a claim not barred by the statutes of limitations. In so doing it said: "Plaintiff's complaint shows that all those persons who constitute plaintiff's corporate being had knowledge and

approved of the transaction complained of and such approval may be found on the company's books. It is an elementary proposition of law that fraud requires complainant's lack of knowledge and that affirmance waives fraud. * * * Notice to all of the stockholders of a matter so intimately affecting their rights must be deemed notice to the corporation. What we have here, however, is more than mere notice to the corporation. We have plaintiff alleging in his complaint actual knowledge on the part of all the stockholders of the corporation who would be entitled to complain of the wrong. As unanimous consent renders fraud impossible, no wrong has been done to the plaintiff." (Appdx. Pet. 11a.)

Moreover, the Court would make no distinction between knowledge and consent of stockholders who are trustees and stockholders who are not trustees. It said: "Stockholders who are trustees of stock are nonetheless stockholders with all the powers and rights of stockholders. Their fiduciary obligations to their beneficiaries do not deprive them of their status as shareholders or make the beneficiaries shareholders in their place. They and they alone hold the legal title to stock and the right to vote it and exercise all other rights incident thereto. 'Shares standing in the name of any person as * * * trustee * * * may be voted and all rights incident thereto may be exercised only by the * * * trustee * * * in person or by proxy, and without proof of authority.' Cal. Corp. Code Sec. 2218." (Id. p. 12a.)

Petitioner necessarily recognizes the correctness of the holding of the District Court on these two points for it says it does not tender, as an independent ground supporting the exercise of this Court's cer-

tiorari jurisdiction, the holding on the points. (Pet. pp. 13-14).

The District Court went on to hold that petitioner's claim must be dismissed for another reason, giving as the reason that if petitioner ever had a claim the claim was barred by the statutes of limitations of California before this action was brought (id. p. 13a). Again, petitioner nowhere in its petition contends the Courts below erred in holding its claim was barred.

Petitioner at times contended in the Courts below that the action of its stockholders in consenting to and approving the transactions was not binding on it because its stockholders were trustees who had breached their fiduciary duties to the beneficiaries of the Henry Miller Trust when they consented to and approved the transactions. At other times, it denied that it had "ever suggested that it was the breach of the Henry Miller Trust which was in question."[1] The District Court finally disposed of the petitioner's conflicting positions by holding as a further and additional ground for dismissing the complaint that even if petitioner had a claim which arose out of the trustees' breaching a fiduciary duty to the beneficiaries of the Henry Miller Trust when they consented to and approved the corporate transactions, nevertheless the trustees and beneficiaries of the Trust would be indis-

[1] In petitioner's Opening Brief in the Court of Appeals it said at pp. 60-61: "Nowhere in the complaint nor in oral argument nor in written argument has appellant ever suggested that it was the breach of the Henry Miller Trust which was in question. This suggestion has come solely from the appellees who have at every opportunity attempted to contort appellant's position. This is a *corporate* action, brought by the *corporation* for the breach by its fiduciaries of their duty to the corporation. The defendants may also be guilty of wrongs to others but that is completely irrelevant."

pensable parties, and their joinder would destroy diversity jurisdiction (Appdx. Pet. pp. 13a-14a). This was true, the Court said, because all of the beneficiaries were residents of California, and some of them were the trustees of the Henry Miller Trust and the directors of the corporation who were charged with wrongs in consenting to and approving the transactions. In this regard the Court said: "It is also to be noted that plaintiff charges in his complaint that some of the beneficiaries are wrongdoers—in fact at least one is charged as a party to the conspiracy. *Therefore, there are conflicting interests among these beneficiaries which must be litigated herein.* In order for this Court to enter any judgment equitable in nature, the respective positions of the various beneficiaries must be determined. It is apparent, therefore, that this action will fail on jurisdictional grounds if these indispensable parties are brought in." (Emphasis supplied) (Appdx. Pet. pp. 13a-14a.)

These parties who the Court held were indispensable parties and whose joinder would have defeated diversity jurisdiction, are the parties whom petitioner now says it has been prevented from substituting as plaintiffs by something the Court of Appeals said in its opinion about some dropped defendants.

The Court of Appeals in a unanimous opinion affirmed the judgment of dismissal (Appdx. Pet. pp. 15a-26a). After reviewing the allegations in the complaint and the holding of the District Court that the unanimous consent of petitioner's stockholders rendered fraud impossible, the Court said: "That a corporation is hurt, or destroyed, by the intended conduct of the owners of its shares, gives rise to no legal claims, either in the shareholders, or in the corporation as a legal entity." (Id. p. 24a.)

The Court went on to point out that the minutes of petitioner's board of directors showed that these transactions had been investigated in 1939 by the board and, after having been discussed at two successive meetings, the investigation was closed.

We will discuss later (*infra* pp. 7-9) what the Court said about petitioner dropping some of the defendants from its complaint.

REASONS FOR NOT GRANTING CERTIORARI

Petitioner does not seek certiorari, so it says, on the ground that the Courts below erred in holding that it had no claim, or no claim not barred by limitations (Pet. pp. 13-14). It seeks the writ solely on the ground that the Court of Appeals held that the defendants whom petitioner had voluntarily dropped from the action before it filed its second amended complaint, were indispensable parties, a holding which the Court did not make. It readily concedes that the holding of the Courts below that it has no claim is an independent ground on which their decisions can rest, but it argues that the further holding that the dropped defendants were indispensable parties has forever prevented it from substituting the trustees and beneficiaries of the Henry Miller Trust for it as the plaintiffs (Pet. pp. 19-22). The argument is without merit as we shall show.

A. Court Did Not Hold What Petitioner Says It Held

The Court of Appeals nowhere in its opinion held that the dropped defendants were indispensable parties. It neither cited nor discussed Rule 19, Federal Rules of Civil Procedure, nor did it use the words "indispensable parties" anywhere in its opinion in connection with the dropped defendants. If what the

Court said about the dropped defendants means, as petitioner contends, that they were indispensable parties, such meaning must be gathered from a construction of the language in the opinion and not from what the Court expressly said. The construction which petitioner contends for is not reasonable because the Court was familiar with Rule 19 and its own opinions on indispensable parties, but never cited either, or expressly held that the dropped defendants were indispensable parties.

All the Court did or intended to do was to point out that if a claim had been stated and the case had been tried on the second amended complaint, a court of equity might have concluded that the liability of the transferees, who had acquired their lands by mesne conveyances, and who remained in the case as defendants, would be different from that of the dropped defendants who, as trustees, owned all of petitioner's stock, and had been named in the second amended complaint as the primary wrongdoers. It said: "A court of equity might well conclude that it should not require the party least at fault to bear alone the entire responsibility for the wrong." (Appdx. Pet. p. 21a.) The Court merely was pointing out the problems which would certainly arise, and the inequities which would follow, were the Court to hold that a corporation can upset its ancient deeds knowingly approved by all of its stockholders.

Petitioner's argument that the Court held that the dropped defendants were indispensable parties under Rule 19 is new. No such argument was made by petitioner in its petition for rehearing, nor did it there cite Rule 19, or even mention indispensable parties in regard to what the Court said about the dropped de-

fendants. Furthermore, petitioner never even suggested in its petition for rehearing that it had forever been foreclosed, by what the Court said in its opinion about the dropped defendants, from substituting the trustees and beneficiaries of the Henry Miller Trust for it as the plaintiffs. Petitioner did not make this suggestion because it was aware that both Courts below knew that petitioner not only had not requested leave to make the substitution, but that it had opposed bringing the trustees and beneficiaries into this action.

B. Judgments Are Based On Other Independent Grounds

Even if the Court of Appeals did hold, as petitioner argues it did, that the dropped defendants were indispensable parties, this Court need not decide whether the Court below erred in such holding because the opinion of the Court shows that its judgment is supported by other independent grounds; viz, that petitioner has no claim, and that any claim it may ever have had is barred by limitations. These two independent holdings have not been presented by petitioner as questions for review under Rule 23(1)(c), nor does petitioner contend that any question regarding the holdings is included or fairly comprised within the single question presented in the petition.

Moreover, it is also unnecessary for this Court to consider the single question presented in the petition, because where a claim is not stated in the complaint a court is not required to determine who would have been necessary parties defendant had a claim been stated. *Bourdieu* v. *Pacific Western Oil Co.*, 299 U.S. 65, 70 (1936).

The Monrosa v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959); *Stickel* v. *United States*, 76 S. Ct. 1067, 1 L. Ed. 2d 30 (1956) not officially reported.

C. Issue Of Substitution Not Raised Below—No Validity To Argument

For the reasons just discussed it would appear that no further argument is necessary, because (a) the judgments of the Courts below were the only valid judgments which could have been entered; and (b) the grounds on which the judgments were entered are not challenged as a basis for this Court exercising its certiorari jurisdiction. However, since petitioner pretends to have been forever foreclosed from attempting to substitute other plaintiffs for it by something the Court of Appeals said in its opinion on a wholly immaterial matter, we will briefly reply to petitioner's argument on substitution. It is important to note, though, that petitioner has presented no question on substitution under Rule 25(1)(c).

(1) It was nothing the Court of Appeals said in its opinion about the dropped defendants which foreclosed petitioner from substituting the trustees and beneficiaries for it as the plaintiffs. One of the many reasons why petitioner is now foreclosed is that neither it nor the parties it would now substitute timely requested leave to substitute. Whether leave should have been granted had the request been timely made, is not a question before this Court, because this question would have arisen only had leave been requested. Whether a judgment of dismissal should be reopened to allow an amendment cannot be raised in a brief where no motion to reopen was made in the District Court. *Gutensohn v. Kansas City Southern Ry. Co.*, 140 F. 2d 950, 952 (8th Cir. 1944). What petitioner actually seeks for the first time in this Court is a reopening of a judgment which it does not contend, as grounds for certiorari, was wrong.

Moreover, petitioner not only did not request leave of the District Court to make the substitution, but it actually contended that the trustees and beneficiaries were not indispensable parties, and should not even be in the case because, it argued, the claim it was asserting was not their claim, but its own claim. For this reason alone the question on substitution, which petitioner now argues, need not be decided by this Court.[3]

How this Court could review a decision or ruling never made by either Court below, petitioner does not say. Obviously the argument on substitution, made for the first time in this Court, is an attempt to make it appear that petitioner has been harmed by an expression of the Court of Appeals on a wholly immaterial matter, and that there is substance to the single question presented in the petition.

(2) We would further like to point out that if leave to amend and substitute had been requested at any time, the District Court could not have granted the request because the substitution would have destroyed diversity jurisdiction. This would have been true because the new plaintiffs would have been citizens of California, and forty-four of the fifty-seven defendants already in the action were also citizens of California. It would also have been true because the beneficiaries, including J. Leroy Nickel, Jr., who had been charged by petitioner with wrongdoings, and who, too, were citizens of California, would have been, according to the decision of the District Court (Appdx.

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[3] *Ellis* v. *Dixon*, 349 U.S. 458, 460 (1955); *United States* v. *Fleischman*, 339 U.S. 349, 365 (1950); *Delgadillo* v. *Carmichael*, 332 U.S. 388, 391 (1947); *Owens* v. *Union Pacific R. Co.*, 319 U.S. 715, 724 (1943); *Walters* v. *City of St. Louis, Mo.*, 347 U.S. 231, 233 (1954); *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941).

Pet. pp. 13a-14a) indispensable parties defendants in any action involving a breach of the Henry Miller Trust. Petitioner does not explain how diversity jurisdiction could have been saved under either of these circumstances.[4]

(3) Moreover, the position petitioner has taken in this Court regarding substitution is so contrary to the position it took in the District Court regarding the trustees and beneficiaries not being indispensable parties to its action, that petitioner should not be

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[4] Petitioner, in an attempt to show that diversity jurisdiction would not be destroyed if new plaintiffs were substituted, argues that "in all likelihood the complaint would under the circumstances be amended to name the present trustees of the Henry Miller Trust rather than the beneficiaries as plaintiffs." (Pet. p. 21, n. 11.) It then goes on to say that the Court of Appeals was wrong when it held that the beneficiaries would have to be the plaintiffs in any action involving a breach of the Trust. We respectfully submit the Court was not wrong. The trustees could not have brought such an action because they could not have represented the beneficiaries where the interests of the beneficiaries were in conflict, and they would have been in conflict since there would have been wrongdoing beneficiaries and non-wrongdoing beneficiaries. Their interests would have had to be settled requiring their joinder. *Carey, et al.* v. *Brown*, 92 U.S. 171, 172 (1875); *Mitau* v. *Roddan*, 149 Cal. 1, 7-8, 84 Pac. 145, 147 (1906); *Straube* v. *Security First Nat. Bank of Los Angeles*, 205 Cal. App. 2d 352, 361, 23 Cal. Rptr. 213, 219 (1962); Bogert, Trusts and Trustees (2d ed.), § 593, p. 277. Furthermore, J. Leroy Nickel, Jr. was not the only beneficiary that petitioner charged with wrongdoings. Also charged were J. Leroy Nickel, Sr., a life tenant beneficiary from 1916 to 1937; Nellie Miller Nickel, a life tenant beneficiary from 1916 to 1944; George W. Nickel, Sr., another life tenant beneficiary; and George W. Nickel, Jr. and Henry Miller Bowles, both contingent remaindermen beneficiaries, all of whom were at one time or another directors of petitioner. (R. vol. 4, pp. 17-20, 329-331; R. 455, 595, 601-603, 753-754.) Because these beneficiaries were charged with wrongdoings the District Court said: "It is also to be noted that plaintiff charges in his complaint that some of the beneficiaries are wrongdoers—in fact at least one is charged as a party to the conspiracy." (Appdx. Pet. p. 13a.)

heard to say in this Court that the trustees and the beneficiaries should be subsituted for it as the plaintiffs. Petitioner invoked a ruling in the District Court (Carter, J.) on its first amended complaint that the new trustees and the beneficiaries were not indispensable parties to its action. (Appdx. Pet. pp. 1a-5a.) It then filed a second amended complaint in which it appeared more clearly than ever that petitioner had no claim, but that if it did have a claim the new trustees and the beneficiaries would be indispensable parties. Again petitioner contended that the trustees and the beneficiaries were not indispensable parties, but the District Court (Wollenberg, J.) held that (a) petitioner had failed to state a claim; (b) that if it had stated a claim its action was barred by limitations; and (c) that if it had stated a claim not barred by limitations the new trustees and the beneficiaries would be indispensable parties to any claim it might have, and their joinder would destroy diversity jurisdiction. (Appdx. Pet. pp. 10a-13a.) Petitioner never thereafter sought leave to amend its pleadings to bring into this action the trustees and beneficiaries, if they could have been brought in, nor did it seek leave to substitute them for it as the plaintiffs, if they could have been substituted. Thus we see that not only did petitioner not seek substitution, but it actually opposed bringing into its action the parties it now says it has forever been prevented from substituting as the plaintiffs for it. Positions so inconsistent are not to be tolerated.

(4) We will not extend this brief by debating with petitioner the question of whether substitution could have been made had leave been timely requested. Suffice it to say that leave was never requested. How-

ever, we must say that we do not agree with petitioner's argument that leave would have had to be granted as a matter of law.[5]

Petitioner's further argument in this Court that the claim of the trustees and beneficiaries would be the

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[5] Petitioner's argument that substitution will be permitted so long as recovery is sought upon the same general set of facts is a misstatement of the law. The law of California and in the federal courts is that substitution will not be permitted where the defendant would be required to answer a wholly different legal liability or obligation from that originally stated. The cases cited by petitioner are essentially different from the instant case. *Klopstock* v. *Superior Court*, 17 Cal. 2d 13, 108 P.2d 906 (1941), involved a mere error in the nominal party-plaintiff who brought a derivative suit for the benefit of the corporation. The executor of the deceased executor of the estate of a deceased stockholder brought suit in that case instead of the representative of the estate of the deceased stockholder. The California Court permitted substitution because the claim was still the claim of the corporation. In the instant case, petitioner seeks to substitute for a corporate claim the wholly distinct claim of different persons, the beneficiaries of the Trust which owned the corporation's stock. Petitioner's other cases are also distinguishable. In *Wennerholm* v. *Stanford University School of Medicine*, 20 Cal. 2d 713, 128 P. 2d 522 (1942) the same plaintiff was permitted to amend a claim for negligence to one for fraud upon the same general set of facts without suffering the bar of the statute of limitations upon the amended claim; a wholly new plaintiff was not involved. In *Austin* v. *Massachusetts Bonding & Ins. Co.*, 56 Cal. 2d 596, 364 P. 2d 681 (1961) it was held that where a defendant surety was sued by fictitious name and its true name later discovered and substituted by amendment, it is considered a party to the action from the commencement of the action so that the statute of limitations stops running from the date of the earlier pleading. *Hackner* v. *Guaranty Trust Co.*, 117 F. 2d 95 (2nd Cir. 1941) was a class action and did not involve any new cause of action. The Court permitted joinder of an additional plaintiff where no statute of limitations was involved. *American Fid. & Cas. Co.* v. *All American Bus Lines*, 190 F. 2d 234 (10th Cir. 1951) allowed substitution of an excess insurer as the real party in interest in place of the plaintiff insured who was suing the primary insurer for alleged bad faith in failing to accept an offer of settlement where no new cause of action was introduced.

same as the claim previously asserted by petitioner is contrary to the position it took in the Courts below. It there argued that the claim it was asserting was a corporate claim, while the claim of the trustees and beneficiaries would be a claim for a breach of the Henry Miller Trust. It said that it had never "suggested that it was a breach of the Henry Miller Trust which was in question." *Supra* p. 5, n. 1. In speaking of the two different claims it again said in its Reply Brief in the Court of Appeals (p. 8): "They present two separate and distinct causes of action lying in two separate and distinct parties."

If the question had been raised below, we submit that leave to substitute could not have been granted because the claims would have been different, the parties would have been different, and the claim of the substituted parties would have been barred by limitations, if for no other reason, because the new complaint could not have related back to the date of the original complaint.[6] Moreover, diversity jurisdiction would have been destroyed. *Supra* pp. 11-12

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[6] The petitioner's claim was one for fraud upon it by its officers, agents and others, and involved questions of corporate knowledge and assent and limitations against a corporation. It did not involve any question about the knowledge and consent of the benficiaries to the corporate transactions, but only the knowledge and consent of petitioner's stockholders, directors and officers. In contrast, a claim by the new trustees and the beneficiaries would have been a claim for a breach of the Henry Miller Trust, and would have involved questions of knowledge and participation by the beneficiaries, the terms and validity of the Trust, applicable trust law and limitations against beneficiaries. The two different claims would have involved wholly different potential liabilities. See *Shenberg* v. *DeGarmo*, 61 Cal. App. 2d 326, 331, 143 P. 2d 74, 77 (1943), hrng. den. An amendment will not be permitted to set up a different claim under California law. *Dubbers* v. *Goux*, 51 Cal. 153, 155 (1875); *Baker* v. *Littman*, 138 Cal. App. 2d 510, 515, 292 P. 2d

The Trustees and Beneficiaries Are Alone To Blame If Their Claim Is Barred

Petitioner assumes, without any justification, that the 25-year old claim of the trustees and beneficiaries was not barred by the 3-year statute of limitations of California (§§ 312, 335, 338(4), California Code of Civil Procedure) when petitioner brought this action on September 10, 1954 (R. 49), but it says that their claim has since become barred. It then, by inference, blames the District Court for the trustees and beneficiaries allowing the bar to fall against their claim. The blame has been misplaced, as we shall show.

The beneficiaries—or at least some of them—filed two identical suits on their claim in two different state courts of California at about the same time petitioner instituted this action, but they voluntarily dismissed both actions even before Judge Carter held on May 15, 1956 that, on the basis of the allegations in the first amended complaint, the trustees and beneficiaries were not indispensable parties in this action (R. vol. 4, pp.

595, 598 (1956); or under federal practice. *National Maritime Union of America* v. *Curran*, 87 F. Supp. 423, 428 (S.D.N.Y. 1949); *Schwartz* v. *The Olympic, Inc.*, 74 F. Supp. 800, 801 (D. Del. 1947); *Schram* v. *Poole*, 97 F.2d 566, 572 (9th Cir. 1938); *St. Paul Fire and Mar. Ins. Co.* v. *Continental Bldg. Op. Co.*, 137 F. Supp. 493, 494-495 (W.D. Mo. 1956); *Aarhus Oljefabrik A/S* v. *A. O. Smith Corp.*, 22 F.R.D. 33, 35 (E.D. Wis. 1958). A complaint setting up a new claim will not relate back to the date the original complaint was filed so as to avoid the bar of limitations, and this is particular true where the plaintiffs are all new: *Stone* v. *James*, 142 Cal. App. 2d 738, 740, 299 P. 2d 305, 307 (1956); *Thompson* v. *Palmer Corp.*, 138 Cal. App. 2d 387, 396, 291 P. 2d 995, 1001 (1956); *Ward* v. *Oakley Co.*, 125 Cal. App. 2d 840, 851-852, 271 P. 2d 536, 543-544 (1954); or where the original plaintiff did not state a claim. *Weighel* v. *United States*, 47 Ct. Cl. 528 (1912).

134-147, 259-272). Therefore, petitioner cannot contend that the beneficiaries, in dismissing their state court actions, relied upon an opinion of Judge Carter which had not been rendered.

But even more than that, Judge Carter in his opinion of May 15, 1956, did not hold that petitioner had stated a claim, or had stated a claim not barred by limitations. He reserved these questions for future determination. But before the determination could be made, petitioner, rather than face the motions to dismiss its first amended complaint, elected to file on April 17, 1958 (R. 460) a second amended complaint in which it made vitally different allegations. This second amended complaint was filed more than three years after petitioner instituted this action, and if the bar of the 3-year statute of limitations fell against the claim of the trustees and beneficiaries during this period of more than three years, petitioner or the trustees and beneficiaries must assume the responsibility, and not the District Court.

Petitioner offers no reason why the beneficiaries dismissed the state court actions, or why they did not bring another action in some other court before the bar of limitations fell. The beneficiaries must have known all along that petitioner was contending that this action involved only its claim, and not the claim of the beneficiaries, and was also contending that the beneficiaries were not indispensable parties to its claim. Also, the beneficiaries must have known, if it can be said they relied in any way on what Judge Carter said in his opinion, that only the claim of petitioner was involved in this action, and that whether the petitioner had stated a claim was reserved by the Court for later decision. Everything points to the bene-

ficiaries either being dilatory or having no desire to prosecute any claim they may ever have had.

Respondents, whose titles have been clouded for more than nine years, are entitled to have this litigation come to an end. The District Court gave petitioner every opportunity to state a claim, or to state a claim not barred, if it could, but it could not. It now admits, by not presenting the question, that it has no claim. When the District Court ordered this action dismissed it did not order it dismissed without leave to amend, but petitioner did not again seek leave to amend, or to substitute. On the contrary, it elected to stand on its second amended complaint. It cannot argue that the District Court did anything which prevented it from seeking leave to amend or to substitute, or prevented the new trustees and the beneficiaries from bringing their claim, if any, into a proper court. If petitioner, who has no claim, is allowed to return to the District Court and ask at this late date for leave to substitute the new trustees and the beneficiaries of the Henry Miller Trust and their claim, respondents' titles will continue to be clouded for many more years by a stale claim.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 633

Supreme Court of the United States

OCTOBER TERM, 1963.

MILLER & LUX INCORPORATED, *Petitioner*,

v.

R. H. ANDERSON, ET AL., *Respondents*.

REPLY MEMORANDUM OF PETITIONER

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December 23, 1963

Supreme Court of the United States

OCTOBER TERM, 1963

No. 633

MILLER & LUX INCORPORATED, *Petitioner*,

v.

R. H. ANDERSON, ET AL., *Respondents*.

REPLY MEMORANDUM OF PETITIONER

Petitioner will not burden the Court with a lengthy reply. Certain of the arguments made by respondents in opposition, however, merit brief comment:

I.

The Brief for Respondents in Opposition argues (at p. 9) that there is no occasion for this Court to review the decision of the Court below that certain absent persons were indispensable parties defendant because "the opinion of the Court shows that its judgment is supported by other independent grounds: viz., that petitioner has no claim, and that any claim it may ever have had is barred by limitations."

As we have earlier demonstrated, the first of the two "other independent grounds" referred to, that petitioner may not seek recovery on account of the wrongs set forth in the complaint because some of the wrongdoers gained for a time legal title to all of petitioner's stock as trustees and "consented" to their own wrongs

by failing to sue themselves, is in fact not an independent ground at all. The reason that this Court will not review one ground of a decision resting on more than one truly independent ground is that under such circumstances review can be no more than advisory, and can have no practical consequences in the particular litigation. Here, in contrast, as we have shown in our Petition for Certiorari, reversal of the Court of Appeals' plainly erroneous ruling on the issue of indispensable parties will have specific practical consequences, in opening for the first time a course heretofore closed by that ruling—an application to substitute petitioner's trustees or beneficiaries as plaintiffs in this action. Such substitution has heretofore been impossible because those trustees and most of those beneficiaries are citizens of California, and the persons determined by the courts below to be indispensable parties defendant are also citizens of that state, so that substitution would necessarily have destroyed the diversity jurisdiction of the District Court.

The second "independent ground" of decision below to which respondents advert—that any claim of petitioner is barred by limitations—is not in fact suggested in the opinion of the Court of Appeals. In any event, even had that Court advanced such a ground of decision, it would plainly have been merely a restatement of the proposition just discussed, that the "consent" of the wrongdoing trustees to their own wrongs bars recovery by petitioner. For it was only these wrongdoers, and not petitioner's beneficial owners, who had any knowledge of the wrongs complained of prior to 1954, and even if their knowledge could have caused the statute of limitations to continue to run against petitioner,

it would plainly not have had that result as to petitioner's present trustees and beneficiaries who were altogether innocent of any knowledge. Here again, in the circumstances of this case any such ground of decision would not have been a truly independent and alternative one barring review by this Court of the determination as to indispensable parties. For here again a reversal of the latter determination would for the first time open the way to a substitution of plaintiffs as to whom any ruling that petitioner itself is barred by limitations could not apply.

II.

Respondents attempt to make much of the fact that no effort was made below to substitute petitioner's trustees or beneficiaries as parties plaintiff in petitioner's stead. The fundamental fallacy in this line of argument is that the determination of the courts below that certain citizens of California were indispensable parties defendant made any attempt at such substitution impossible, since, as above recited, the only persons who could have been substituted as plaintiffs are also California citizens so that substitution would have destroyed diversity jurisdiction. Only after the determination made below as to California indispensable parties defendant is set aside will there arise, *for the first time*, an opportunity to seek substitution of California parties plaintiff.[1]

[1] Respondents state that "the question on substitution * * * need not be decided by this Court", but nevertheless go on to make a labored attempt to demonstrate that the District Court should not allow substitution in the circumstances here presented. We heartily agree that the question on substitution need not, and should not, be decided here. That is obviously a question to be determined in the first instance by the District Court. What petitioner here seeks is simply an opportunity to present the question to that Court.

Finally, respondents argue that review can have no practical consequences because substitution would in any event have to be denied on the ground that the presence of California plaintiffs would destroy diversity jurisdiction, because many of the presently named defendants, and also J. Leroy Nickel, Jr., held below to be an indispensable party defendant, are also California citizens. The short answer to this suggestion is that once the indispensable parties ruling made below has been reversed, it will be possible to dismiss as defendants all those that are citizens of California, and to proceed against the remaining defendants for at least partial redress of the grievances for which they are responsible.[2]

Respectfully submitted.

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[2] The Brief of Respondents Trico Oil and Gas Company and Gene Reid Drilling, Inc., in Opposition appears to urge that the judgment below is supportable on the additional ground that certain citizens of Nevada, not subject to the jurisdiction of the District Court, are indispensable parties to this action. Neither the opinion of the District Court nor that of the Court of Appeals suggests reliance by those courts on any such proposition. In any event, it is clear that the argument as to the indispensability of those persons is premised solely on their relationship to Trico Oil and Gas Company and Gene Reid Drilling, Inc. Because the latter two corporations are California citizens, a substitution of plaintiffs in the District Court will have to be accompanied by their dismissal as defendants. And when this is done, the contention that others are indispensable co-defendants with them will be rendered moot.